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ABSTRACT

Research findings along with recommendations for change in Federal law and policy that would protect and strengthen the tribal right of self government constitute the final report of the Tribal Government Task Force. From the range of issues and problems identified in the task force effort emerged six basic subject areas around which this final report is structured. The first four chapters describe from differing perspectives the relationship of Indian tribes to the Federal Government. They discuss (1) the relationship between the Bureau of Indian Affairs and the tribes as governments, (2) the nature and extent of the governmental responsibility possessed by Indian tribes and the statutory obstacles to the exercise of tribal self government powers, (3) the specific needs tribes have expressed for resources and technical assistance to support the basic function of government, and (4) the domestic assistance programs and problems in eligibility, delivery systems and program requirements that constitute obstacles to full tribal participation. The final three chapters deal with land consolidation and acquisition, special problems of small tribes, and the task force's analysis of tribal government accountability. (DS)

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REPORT ON TRIBAL GOVERNMENT

TASK FORCE TWO: TRIBAL GOVERNMENT

FINAL REPORT
TO THE
AMERICAN INDIAN POLICY REVIEW COMMISSION

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[COMMITTEE PRINT]

REPORT ON TRIBAL GOVERNMENT

TASK FORCE TWO: TRIBAL GOVERNMENT

FINAL REPORT
TO THE
AMERICAN INDIAN POLICY REVIEW COMMISSION

ALAN PARKER, Chippewa Cree, *Member*
JERRY FLUTE, Sisseton-Wahpeton Sioux, *Member*
MICHAEL COX, Creek, *Specialist*
PATRICIA ZELL, Navajo-Arapaho, *Specialist*

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Kirke Kickingbird, *Kiowa*

Professional Staff Member
Max I. Richtman

LETTER OF TRANSMITTAL

American Indian Policy Review Commission,
Congress of the United States,
Washington, D.C.

Hon. James Abourezk,
U.S. Senate, Dirksen Building, Washington, D.C.
Hon. Lloyd Meeds
House of Representatives, Rayburn Building, Washington, D.C.

Gentlemen: Transmitted for your review and consideration is the final report of the Task Force on Tribal Government, which was completed pursuant to Public Law 93–580. The report was formally submitted to me July 30, 1976.

This Task Force has submitted its report in four volumes, three of which constitute appendices including case studies. Because of the volume of copying involved, we are forwarding the body of the final report and will copy and forward the appendices later. The Commission meeting on August 10, 1976 will be utilized to review the findings of this Task Force.

We are forwarding a speech included in the appendices delivered by the late Wilbur Atcitty, the Tribal Government Task Force Chairman, which was given before the Annual Convention of the National Congress of American Indians on November 14, 1975. Since this speech was referred to in the tribute in the front of the report, it is also included.

The Commission staff is currently performing a comparative analysis of the final reports. This approach provides an in-depth analysis of the substantive areas which will provide a rational basis for selected alternatives. Additionally, a staff review will be completed and forwarded on August 4, 1976 which will constitute a staff paper to be utilized as a reviewing device for the Commission meeting.

Although I have not yet been able to carefully review this report, it generally appears that a standard of professional competence has been established for the remaining Task Forces.

Respectfully submitted.

Ernest L. Stevens,
Director.

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MAY 27 1980

American Indian Policy Review Commission,
Congress of the United States,
Washington, D.C., July 1976.

The American Indian Policy Review Commission,
Congress of the United States, Washington, D.C.

Dear Sirs and Madam: The Task Force on Tribal Government presents to you its final report pursuant to Public Law 93–580.

The Tribal Government Task Force Report contains the task force's analysis, findings and recommendations of the major issues confronting tribal governments.

In response to the cooperation received by many Indian tribes and organizations, the task force urges that those groups and other interested parties be given an opportunity to review and comment on the Tribal Government Task Force Report prior to the issuance of the final commission report.

The Tribal Government Task Force urges your careful consideration of the facts presented and your cooperation in insuring the implementation of the recommendations contained herein.

Respectfully submitted.

Alan Parker (Chippewa Cree),
Jerry Flute (Sisseton-Wahpeton Sioux),
Michael Cox (Creek),
Patricia Zell (Navajo-Arapaho).

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The Task Force on Tribal Government owes a debt of gratitude to the many Indian tribal community leaders and individuals who took the time to participate in the task force hearings and meetings and graciously cooperated with our many field researchers.

TASK FORCE ON TRIBAL GOVERNMENT

Members.—Alan Parker, Attorney, Chippewa-Cree; Jerry Flute, Tribal Chairman, Sisseton-Wahpeton Sioux.
Specialist.—Michael Cox, Attorney, Creek.
Staff.—Patricia Zell, Ph. D., Navajo-Arapaho.

ACKNOWLEDGMENTS

The final report of the Tribal Government Task Force represents not only the efforts of the task force members and staff, but also the work of many friends and consultants who did their best for us, often under trying circumstances. We would particularly like to identify the following individuals in grateful appreciation for their work:

Claudeen Arthur: Navajo, Attorney—Field Reports on Zuni Pueblo, Uintah-Ouray Reservation, Sisseton-Wahpeton Sioux.

Larry Blacktooth: Pala—Field Reports on Soboba Indian Reservation, Santa Rosa "Tachi" Reservation, Pyramid Lake Paiute Reservation, Pala Indian Reservation.

Martin Blank: Attorney, R.J. Associates—Tribal Government Survey development, Tribal Government Issues Statement, training of Tribal Government Field Consultants.

Jerry Bernstein: Ph. D., R.J. Associates—for his invaluable guidance throughout the work of the Task Force.

Lorraine Edmo: Shoshone-Bannock—Field Reports on Quinault Indian Reservation, Makah Indian Reservation, Warm Springs Reservation.

Nancy Evans: Commission Research Staff—Analysis of tribal constitutions and bylaws.

James Flynn: Attorney—Follow-up on Tribal Government Surveys, preparation of Exhibits to Tribal Government Task Force Report.

Jill Miller Godoff: R.J. Associates—Tribal Government Survey development.

Gerald Hill: Oneida, J.D., University of California at Davis—Case Study Crow Creek Tribal Court System.

Bob LaFountain: Chippewa-Cree, Attorney—Field Reports on Cheyenne River Sioux, Standing Rock Sioux, Fort Berthold Reservation, Rocky Boy's Reservation.

Tim LaFrance: Chippewa, 3rd year law student, University of California, Berkeley—A Case Study of Land Management and Land Use Planning on the Quinault Indian Reservation.

Anthony Little: Rosebud Sioux, J.D., Arizona State University—Case Study of Gila River Indian Tribal Court System.

Joseph Myers: Pomo Tribe, Staff Attorney, American Indian Lawyer Training Program—Coal Development v. Crow and Northern Cheyenne Tribes.

Anita Parlow: Task Force Consultant—BIA Support for the Functions of Tribal Government—Case Study of Pine Ridge Reservation.

Fred Ragsdale: Chemehueve Tribe, Professor, University of New Mexico Law School—Federal Authorities Supporting Tribal Power over Non-trust Lands within Reservation Boundaries, Legal Analysis of Indian Reorganization Act, Analysis of Administrative Discretion of Secretary of Interior Regarding Delegated Authority over

Indian Tribal Trust Resources and Income, Full Faith and Credit between State and Tribal Courts—Analysis of Legal and Practical Considerations.

Ryland Rivas: Comanche, Attorney—Field Reports on Creek Tribe of Oklahoma, Comanche Tribe of Oklahoma.

Frank Ryan: Gros Ventre Tribe, 3rd year law student, Harvard University—Taxation Powers of Tribal Governments—Summary of Supporting Legal Authorities.

Ron Solimon: Laguna Pueblo, J.D., University of New Mexico Law School—Case Study of Oglala Sioux Tribal Taxation System, Impact of the Indian Reorganization Act on the Governmental Functions of the Pueblo of Laguna.

Steve Wall: Chippewa, Attorney, Instructor at Fort Lewis College—Field Study of Distinctions Between IRA and Non-IRA Tribal/BIA Relationship—Blackfeet Tribe, Navajo Tribe.

James West: Southern Cheyenne—Field Reports on Laguna Pueblo, Seneca Nation, Northern Cheyenne, Cheyenne-Arapaho Tribes of Oklahoma.

The Task Force wishes to express special thanks to Carole Roop, for her many long hours of dedicated work for the Task Force.

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TRIBUTE TO FORMER TASK FORCE CHAIRMAN

Attached to the final report of the Tribal Government Task Force is the text of a speech delivered by the late Mr. Wilbur Atcitty.*

Mr. Atcitty, a Navajo, and Executive Administrator of the Navajo Tribe for the past several years, served as Chairman of the Tribal Government Task Force until May 6th of this year, when he died in an automobile accident on the Navajo Reservation.

During his tenure as Chairman of the Tribal Government Task Force, Mr. Atcitty made a truly significant contribution to the development of Indian affairs in the leadership and direction which he provided to the work of the Tribal Government Task Force. Throughout his service with the Task Force, Mr. Atcitty exhibited a dedicated and committed state of mind, and spurred us on to attempt to make the best of this opportunity to exert a positive, long-lasting influence on the direction of Federal-Indian policy towards tribal governments.

Being an official of the Navajo Tribe, Mr. Atcitty could have taken a limited view towards the question of Federal-tribal governmental relations, and could have attempted to influence the Task Force to pursue the particular objectives of the Navajo Tribe. However, as reflected in his speech, at no time did Mr. Atcitty adopt such a narrow approach, but rather, his concern was always for the total national Indian community. He advocated unity among the tribes, and a seriousness of purpose, which if adopted by tribal leaders throughout the country, would speak well for the future development of Indian tribal governments.

His speech, which was delivered at the 39th Annual Convention of the National Congress of American Indians on November 14, 1975, captures the essence of Mr. Atcitty's philosophy and views.

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*Appendix XX.

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INTRODUCTION

The Tribal Government Task Force is pleased to present its final report to the Commissioners of the American Indian Policy Review Commission and to the Congress. The report summarizes our research findings and identifies recommendations for change in Federal law and policy which, if implemented, will protect and strengthen the most basic of all Indian tribal rights, the right of self-government, according to the unique cultural and community values of each individual tribe.

At the outset, the task force wishes to emphasize the political-legal definition of Indian tribes and nations as sovereign entities. The most far-reaching consideration and problem identified throughout our efforts over the past year concerns the recognition of the status of these sovereign entities as governments in their relationship with the U.S. Government. This most fundamental issue of Federal law and policy cuts across all aspects of the Federal-Indian relationship and is the key to the resolution of the most serious problems, conflicts and inconsistencies in Federal law and policy confronting all Indian Tribal Governments.

The Tribal Government task force approached its task in a most direct manner. We set out to ask as many tribes to identify problems in their relationship with the Federal Government. We identified the various types of tribes and the variety of situations confronting tribal governments in an effort to insure that we received extensive input from all representative sectors of the Indian tribal community. We sent surveys [1] out to every federally recognized Indian tribe and followed up those surveys with visits by task force members and/or field consultants to approximately 30 selected tribes [2] to insure that we reached a comprehensive representation of tribal views. In addition, the task force scheduled a series of regional meetings with tribal government leaders in every area of the country, conducting one- or two-day sessions with each group to insure that we acquired a regional perspective on tribal government problems.[3] Finally, the task force participated in a number of task force hearings [4] in coordination with the jurisdiction, Federal Administration, and trust responsibility task forces. A more detailed description of our task force efforts to obtain tribal views in the most direct manner possible can be found in the collected reports [5] submitted by the task force to the Commission over the past year.

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[1] Appendix XIX : Tribal Government Surveys.

[2] Appendix XVIII : Field Consultant Reports.

[3] Roundtable discussions were conducted with tribal leaders from : North and South Dakota, Washington, Wisconsin and Arizona.

[4] The Task Force participated in hearings held in : San Marcos, California ; Aberdeen, South Dakota ; Missoula, Montana ; Oklahoma City and Muskogee, Oklahoma ; and Phoenix, Arizona.

[5] Exhibit 1 ; Task Forces First, Second and Third Quarterly Reports.

Once an initial determination was made of the range and nature of Tribal Governmental problems, the task force members, staff and consultants engaged in the more traditional, academic and legal research to define parameters of these problems in relation to existing federal statutes, regulations and court decisions. Legal memoranda and reports resulting from this aspect of our task force research forms an integral part of the task force final report; however, primary reliance has been placed upon the views expressed and communicated to the task force by Tribal Governmental leaders and individual tribal members. They have defined the nature, scope and extent of their problems.

From among the range of issues and problems presented in all task force research efforts, we have identified six broad subject areas around which the final report is structured. Each chapter of this report treats an individual subject area and analyzes from different perspectives the continuing issue of whether or not Indian Tribal Governments are indeed true governments as defined by existing Federal law and policy.

The categories which form the substance of the task force final report are as follows:

I. Indian Tribal Governments and the Department of Interior

This chapter analyzes the relationship between Indian Tribal Governments and the prime trust agency of the Federal Government, the Interior Department and its subagency, the Bureau of Indian Affairs. Existing Federal law and policy, insofar as it defines the nature of the relationship between the Secretary of the Interior and his officials and individual Indian Tribal Governments, is a serious of related problems from the perspective of those responsible for Indian Tribal Governments. Essentially, these problems boil down to the proposition that on one hand, the Interior Department and BIA officials are not doing their job in protecting the trust status of Indian tribes,[6] and on the other hand, Federal law and policy continues to support a supervisory role on the part of Federal officials which is in conflict with policy recognizing Indian tribes as independent self-governing political entities within the Federal system. In other words, Tribal Governments are simply not true governments if the Secretary of Interior and his agents continue to possess and exercise authority to veto virtually all forms of tribal governmental action. This chapter of the report will go into the detailed statutes, regulations, court decisions and Solicitor's opinions which have been interpreted to support this continuing supervisory authority on the part of the Interior Department, and will recommend appropriate changes consistent with the maintenance of the trust responsibility by the Federal Government.

II. Indian Tribes as Governments—Problems in the Exercise of Self-Governing Authorities

This chapter of the report analyzes the nature and extent of governmental responsibility possessed by Indian tribes and identifies statutory obstacles to the efficient and logical exercise of self-governing powers by tribal governments presently existing in Federal law and policy. Task force recommendations in this chapter are designed to insure that a Federal policy recognizing the true right of self-government is not contradicted by statutes, which either in express terms, or which are susceptible to such an interpretation, would in effect place logical limitations on the authority of Indian tribes to exercise the powers of self-government.

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[6] Appendix I; Chapters I and III.

III. RESPONSIBILITY TO PROVIDE SUPPORT FOR THE FUNCTIONS OF TRIBAL GOVERNMENT

Throughout its year of study, the task force found that perhaps the most basic reason why Indian Tribal Governments are not functioning at a level of maximum effectiveness is simply that Indian tribes do not have adequate resources to support the operations of Tribal Government. The task force has identified various areas in which Tribal Governments need Federal support if they are to develop the capacity to effectively meet the needs of the tribal community. This chapter of the report documents the findings of the task force, pointing to the specific needs which tribes have expressed, for resources and technical assistance to support the basic functions of government. This chapter also analyzes existing mechanisms in Federal law that are available to channel such support. Recommendations are primarily addressed to these existing mechanisms, identifying ways in which they can and should be improved to more effectively deliver needed resources and services to tribal governments.

IV. STATUS OF TRIBAL GOVERNMENTS AND FEDERAL DOMESTIC ASSISTANCE PROGRAMS

The report examines the variety of domestic assistance programs administered by the various Federal agencies and identifies the problems in eligibility, delivery systems, and program requirements which in one way or another, constitute significant ongoing obstacles to full tribal participation. In addition, this chapter of the report identifies a number of domestic assistance programs in which tribal participation is subject to state approval and state administrative requirements beyond that which is expressly conferred by Congress in the statutes analyzed by the task force.

The above four chapters describe from differing perspectives, the relationship of Indian tribes to the Federal Government. The task force feels that it cannot emphasize strongly enough the conviction that Indian tribes ought to be uniformly treated under Federal law and policy as independent political units within the federal system. From the earliest days of this country, before the founding of the United States as a government, Indian tribes were recognized as having rights of inherent sovereignty. Although the potential to exercise international sovereignty was clearly limited when the U.S. Government was established, internal sovereignty or the right of self-government has never been limited or abrogated under Federal law and policy. Except for the dark days of termination, the U.S. Government has consistently recognized the rights of self-government on the part of the Indian tribes. This has been the operating principle of the Federal-Indian relationship. However, serious inconsistencies and even conflicts with this basic Federal policy continue to exist and have gone unaddressed by the Congress for too long. Indeed, this lack of addressing formed the basic rationale behind congressional creation of the American Indian Policy Review Commission. The task force recommends that the Commission and the Congress reaffirm the Federal commitment to respect the right of Indian tribal self-government by correcting these inconsistencies and conflicts in Federal law and policy in order that Indian tribes may truly be treated as independent governments.

V. LAND CONSOLIDATION AND ACQUISITION

While Federal law and practices which seriously impede the exercise of the right of self-government have been uniformly identified as problems of the highest priority by Indian tribal leaders, questions of land consolidation and acquisition have also been considered of the most critical significance. Throughout our history, Indians have experienced that without a land base, their chances for survival as a unique tribal entity are, at best, slim. Consequently, in response to tribal expressions concerning the priority to which they attach the problems of land consolidation and acquisition, the task force addressed the issue in a separate chapter of its report. This section documents the nature of the problem as perceived by Indian tribal leaders, and addresses the direction to which the Congress must look in order to define workable solutions. Perhaps the most difficult problem within this category concerns that of fractionated heirship interests in Indian trust allotments. For many years, the heirship problem has been recognized by the Congress, and over the past twenty years, nine legislative proposals have been submitted; however, none have ever become law.

VI. SPECIAL PROBLEMS OF SMALL TRIBES

The majority of Indian tribes can be classified as small tribes, in that 82.9 percent of all federally recognized tribes have populations of less than 1,000 members.[7] Based on this statistic, the task force felt that it was of critical importance to identify a series of tribal governmental problems which are unique to the smaller tribes, and which deserve special attention by the Commission and the Congress.

A number of Federal programs, including the Self-Determination Act Grants Program,[8] use a population formula in the distribution of funds to tribes. Such formulas have no relation to tribal needs and clearly work to the disadvantage of the greatest number of tribes.

Alaska

In April and May of this year, a joint task force[9] field visit to Alaska was undertaken to determine the impact of the Alaska Native Claims Settlement Act on Alaskan natives. In fourteen days of field work, discussions were held with: (1) Ten native villages and village corporations; (2) four regional corporations; and (3) many other

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[7] Appendix XVII.
[8] Section 104(a) of the Self-Determination Act.
[9] Task Forces on Tribal Government; Federal, State and Tribal Jurisdiction; and Economic Development.

Alaska Native organizations. Because of the uniqueness of the relationship of the Federal Government to Alaska Natives, the task forces decided a special, joint task force report on Alaska would be appropriate. This report is being submitted under separate cover and is incorported into each of the three task forces' final reports.

Historical Documentation of the Status of Indian Tribal Governments

The task force recognizes the current national controversy surrounding the exercise of tribal government jurisdiction over nonmembers and over nontribal lands within the boundaries of Indian reservations. Various news articles have appeared, from time to time over the past year in the national media, describing the efforts by various groups of non-Indian individuals, who reside on or near Indian reservations in the Western States, to organize a national pressure group for the express purpose of securing legislation by Congress to abrogate tribal governmental authority over them.[10] Conscious of this trend in public opinion, the task force commissioned a brief historical documentation of Federal policy to demonstrate the degree to which the right of self-government on the part of Indian tribes has been embedded fundamentally in Federal policy since the founding of this republic.[11] In its first definitive statement on the question of Federal-Indian relations, in the landmark case of *Worcester* v. *Georgia*,[12] the U.S. Supreme Court articulated the most basic theory of Federal-Indian law—that Indian tribes are "distinct, independent political communities possessing and exercising powers of self-government derived solely from their original sovereignty." This enduring principle has never been overruled by congressional statute or Federal court decision, and as recently as June 14, 1976, was reaffirmed by the U.S. Supreme Court in the case of *Bryan* v. *Itasca County, Minnesota*, striking down an attempted exercise of taxing power by the state.[13]

The renowned Felix Cohen, in his authoritative treatise, "Handbook of Federal Indian Law," has also articulated this basic principle in the following words:

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government." [14]

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[10] Exhibit 2; "Indian Backlash Group Outlines State Concern", Rapid City Journal; "Non-Indian Rights Claimed", Salt Lake City; See also Letter from Florence DeWar to Congressman Lloyd Meeds, February 23, 1976; and Memorandum from Suquamish Community Club to Senator James Abourezk, February 1976.

[11] Appendix II; Historical Summary of Federal Policy Regarding the Independent Status of Indian Tribal Government.

[12] 31 U.S. (6 Pet.) 515 (1832).

[13] No. 75-5027, Slip op., June 14, 1976.

[14] Cohen, Felix; "Handbook of Federal Indian Law" (Reprinted University of New Mexico Press).

Need for reaffirmation of congressional commitment to the right of tribal self-government

The task force has concluded that a restatement and clarification of this basic principle of Federal-Indian policy is called for on the part of Congress. Such a restatement would effectively supercede existing inconsistencies in other areas of Federal law, such as eligibility standards which have excluded Indian tribes from participation in Federal domestic assistance programs. It may be assumed that Congress and its myriad of congressional committees, established to deal in a comprehensive manner with the entire scope of the Federal responsibility, have not always been aware of the political status of Indian tribes nor have they been aware of the political status of of Federal policy which should dictate all aspects of the Federal-Indian relationship. An illustration of this lack of awareness on the part of Congress is found in the provisions of the Law Enforcement Assistance Administration (LEAA) programs which require Indian tribes to go through the State governments as a condition of participation in the LEAA grant programs. If the House and Senate committees responsible for originating this program had been fully cognizant of the guiding Federal policy towards Indian Tribal Governments, it can be assumed that Indian tribes would accordingly have been defined as eligible for direct Federal funding from Law Enforcement Assistance Administration programs. Since an integral aspect of the Federal policy towards Indian tribes is the guarantee of independence from State jurisdiction and authority, it would accordingly follow that tribal participation in Federal domestic assistance programs would not be in any way conditioned upon state approval of tribal plans or grant applications.

However, because the Indian population comprises only a miniscule percentage of the total population in this country, Indian concerns do not loom large on the political horizons of Congress. Consequently, a great deal of Federal domestic assistance program legislation was no doubt enacted without any conscious attention to the role of Indian tribal governments within the delivery system. The Tribal Government Task Force believes that the final report of the American Indian Policy Review Commission will be a positive step towards correcting this lack of congressional awareness.

Effect of prior termination policy on Indian tribal views

The brief indulgence by Congress in the termination policy of the early 1950's has permanently affected the outlook and mentality of tribal leaders across the country. The task force became very aware of this in discussing tribal views on contracting, under development by the Interior Department and Indian Health Service of the Department of Health, Education and Welfare pursuant to the recently enacted Indian Self-Determination and Education Assistance Act.

It is a widely shared opinion in Indian country that contracting may eventually lead to a termination of the Federal trust responsibility. Indian leaders believe that if they successfully contract as many available programs presently being provided by the Department of Interior and the Department of Health, Education and Welfare, Congress will view this as sufficient proof that there is no longer need for a special Federal-Indian relationship, nor tribal dependence on Federal services.

While the Declaration of Policy to the Indian Self-Determination Act expressly disclaims any intention on the part of Congress to use this act to affect or in any way diminish the Federal trust responsibility recognized by Congress, this disclaimer does not convince Indian people that this congressional intent will be ongoing. It is their understanding that each session of Congress is not bound by the policies set and defined by the previous congressional session.

Tribal leaders are also fearful that once tribes enter into contracts for the administration of authorized Federal programs pursuant to the Indian Self-Determination Act, Congress will simply cease to appropriate monies to fulfill the contracts, resulting in "backdoor" termination. It is very difficult to convince someone with this point of view, that contracting is only an optional device to allow tribes to participate in the delivery of services to their members, and constitutes an opportunity for tribes to build up their own capabilities and internal expertise.

However, tribal concerns are well-grounded in two important facts: (1) The Congress does not consider itself bound by prior legislation in the same manner that courts are bound by the theory of *stare decisis* or precedent. The Congress is free to determine what should or should not be the law, within the constraints of the Constitution, and as a matter of fact, succeeding sessions of Congress may very well decide to completely repudiate a policy vigorously affirmed by the preceding Congressional session. (2) As a matter of Federal Indian law, Congress clearly has the power to terminate the trust relationship. In fact, with the passage of the Alaska Native Claims Settlement Act of 1971,[15] Congress once again exercised this power by expressly revoking all reservations in Alaska with the exception of the Annette Island Reserve.[16]

Termination is presently being urged by non-Indian pressure groups and State officials on bills such as the Indian Law Enforcement Improvement Act of 1975 (S. 2010), the proposed amendment to Public Law 83–280. Examination of recent testimony submitted on S. 2010, by witnesses for States, counties, and State agencies will underscore the point adequately.[17] Tribal fears of the possibility of termination in new Federal legislation are not completely ill-founded.

Analysis of the plenary nature of congressional authority over Indian tribes

Supreme Court cases have clearly stated that in the area of Federal-Indian relationships, the authority of Congress is plenary, or without congressional constraints. This judicial analysis of congressional power over Indian tribes was derived from the late 19th century, when Congress passed legislation abrogating treaties previously negotiated with the Indian tribes. Tribes had filed suit against the Federal Government on the theory that treaties were equal to the Constitution, and therefore, could not be abrogated simply by an act of Congress. The Supreme Court eventually concluded that treaties were analogous to statutes, and in effect, could be overruled by a later statute within the general restraints of the Constitution. The Constitution, in and of itself, does not define any limits to the power of Congress over Indian affairs, but rather, contains only a general affirmation of congressional power to regulate commerce with Indian tribes and enter into treaties with Indian tribes. In the absence of constitutional limitations, the courts have expressly concluded that the power of Congress is plenary. Thus, Congress can abrogate treaties and terminate the trust relationship with Indian tribes.[18]

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[15] Public Law 92–203, 85 Stat. 688.

[16] Section 19(a).

[17] Hearings Before the Subcommittee on Indian Affairs on S. 2010, Part II, May 4–5, 1976.

Task force research indicates that under the existing analysis of Federal Indian law, a Constitutional amendment is the only effective approach to limiting the authority of Congress to terminate the trust relationship.

Need for reaffirmation of tribal rights of self-government

It is the conclusion of the task force that there is a critical need for a restatement and clarification of Federal-Indian policy regarding the political and legal status of Indian Tribal Governments within the federal system.

For example, if Congress were to limit tribal authority to tax nontrust properties and income, the effect would not simply be a balancing of tribal versus State interests over the right to potential income, but rather, the partial termination of tribes, by restricting their ability to function as total governments. This usurpation of tribal powers weakens Tribal Governments to the point that they can no longer claim to be independent political units as defined in *Worcester* and consistently upheld by the Federal judicial system.

The logical conclusion of this argument is not that Indian tribal interests should always outweigh conflicting State interests on a political scale, but that the Congress should keep faith with the tribes, by acknowledging that it would be inconsistent to recognize Indian Tribal Governments as legitimate, independent, autonomous political units, and at the same time, impose limits on their authority to govern.

A congressional clarification of the political and legal status of Indian Tribal Governments, establishing Federal policy, must be consistently applied, and should be designed to provide the strongest possible guarantee for future generations, of the status of Indian tribes within the federal system.

Ongoing internal debate in Indian country concerning the proper strategy to be pursued in the future

Based on tribal fears of termination, there is a continuing debate which has occurred in Indian country for generations concerning the proper strategy and proper role for the development of governments of Indian tribes.

One belief held by Indian people is that the more tribes develop their governments along the lines of the dominant society, and the more their governments begin to actually resemble the white man's government, the less chance they have of maintaining their cultural integrity and traditional values. In part, this reasoning leads to the conclusion that the Tribal Government should only be concerned with protecting the traditional values and customs of the tribe, leaving all manners of governmental concerns, such as delivery of services and extension of jurisdictional authorities, to the trustee. It is felt that as long as the tribe maintains itself as a unique cultural entity, it will survive and will pass the Indian legacy on to future Indian generations.

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[18] See, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902).

Tribal leaders perceive the 1968 Indian Civil Rights Act to be an instrument for such assimilation. The Indian Civil Rights Act requires Indian Tribal Governments to observe certain civil rights protections in exercising their governmental authority which closely parallel the language contained in the U.S. Constitution Bill of Rights. There is strong sentiment in Indian Country that to the extent that Indian tribes become more and more like their neighboring political units, the likelihood increases that Congress will eventually conclude that there is virtually no difference between an Indian Tribal Government and a neighboring county, municipality or State government, and thus, that there is no need for a special relationship between the tribe and the Federal Government.[19]

Indeed, tribal governments who have adopted forms of government closer to that of the dominant society have been more frequently confronted with court decisions which direct increasingly stricter adherence to U.S. Constitutional standards.[20]

On the other hand, the current Federal Indian policy of self-determination encourages the development of strong and viable Tribal Governments and greater participation in the design and delivery of Federal programs. Many tribal leaders believe that they must take advantage of this opportunity, and play a more active role in the assertion of their tribal sovereignty rather than continuing to rely solely on the Federal Government to protect and define tribal rights. The more a tribe is equipped to aggressively assert its own recognized rights, not only is it more capable of insuring that the Federal trustee adequately performs his role in protecting tribal resources and sovereignty, but the greater the chances for tribal survival.

And yet, the attempt by the Cherokees of resisting forced termination by developing sophisticated governments modeled after the white man's government, was unsuccessful, as evidenced in a recent study of the legal system of the Cherokee government conducted by Rennard Strickland, a Cherokee lawyer. Practically all of the Oklahoma tribes were well organized when they were removed to the Indian territory. In hearings held before the Committee on Indian Affairs in 1935, Oklahoma tribal governments of the late 19th century were described as follows:

> ". . . They maintained complete governments; particularly in the East, five tribes areas; they had their own schools; their own legislative assemblies; their own courts. And they did the job well. Under all the conditions they made a record which would have been creditable to any municipality or State in the country." [21]

Yet by successive acts of Congress, specifically the Curtis Act[22] and the Act of April 26, 1906,[23] the five civilized tribes were stripped of their governmental functions. Tribal courts were abolished and U.S. courts established. Their chiefs were made subject to removal by the President, who was authorized to fill by appointments the vacancies thus created. Tribal schools were suppressed, tribal taxes abolished, the sale of tribal public lands was ordered. Finally, their legislature was prohibited from remaining in session for more than 30 days in any one year, and every legislative act or ordinance was declared invalid unless it received the approval of the President.

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[19] Appendix I, Chapter I, pp. 3–4.

[20] See, Federal, State, and Tribal Jurisdiction Task Force Report, Chap. 5 (see generally).

[21] Hearings Before the Committee on Indian Affairs on S. 2047, Cong. 1st Session, 1935, p. 10.

[22] Act of June 28, 1898, 30 Stat. 495.

[23] 34 Stat. 137.

The proponents of termination used the highly developed state of the Cherokees and the other civilized tribes as proof that these tribes were capable of managing their own affairs, and thus, there was no need for the continuation of the Federal-Indian relationship.[24]

The task force has recently become aware of yet another cause for the Indian fear of assimilation and eventual termination, known as the Borgstrom Memo. Labelled "Confidential," this internal memo was written by a Mr. Harold Borgstrom from the Office of Management and Budget to another official within the agency. The task force has been informed that the memo has been widely circulated in Washington, D.C. and has in fact, been reprinted in several Indian newspapers. A copy of one such news article is included in the exhibit 3 of this report for reference of the Commission and the Congress.[25]

The memo contains a recommendation that the Federal policy be designed to terminate the trust responsibility of the Federal Government towards Indian tribes. The memo discusses two distinct approaches to the proposed termination. One approach calls for a gradual cessation of service responsibilities, by bringing the social conditions of tribes up to a par with the dominant society. The other approach would involve a step-by-step withdrawal of the Federal Government from the Federal-Indian relationship.

It is difficult for the task force to determine exactly how this memo should be evaluated. Certainly, it could be judged as simply an internal discussion paper between two bureaucrats within the Office of Management and Budget, and as such, a far cry from official government policy. On the other hand, there is a definite possibility that the policies discussed in the internal memorandum reflect a school of thought widely held in the Office of Management and Budget (OMB). It is not unreasonable to conclude that OMB is searching for a policy approach which would justify the Federal Government's extrication from the Federal-Indian relationship.

The task force has concluded that it is not the role of the task force to directly address the proposed policies of the Office of Management and Budget, on the premise that this one bit of evidence may indicate an entrenched position held by that particular Federal office. However, viewed in the context of the continuing debate discussed above concerning the direction that tribal governments should take for the future (retrenchment versus development), and continuing concern over the advisability of contracting for federal services, it is clear that the Borgstrom memo cannot help but have a distinct influence. To this extent, the task force finds it appropriate to bring this memorandum to the attention of the Commission and the Congress.

More than ever, there needs to be a clarification of Federal policy which expressly denies any intent of assimilation, or more importantly, the termination of the Federal-Indian relationship.

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[24] See, Strickland, R.: "The Fire and the Spirits," University of Oklahoma Press (1975).
[25] Exhibit 3; "The Borgstrom Memo," Confederated Umatilla Journal, July 1976.

CHAPTER I

RELATIONSHIP BETWEEN INDIAN TRIBES AND THE PRIME AGENT FOR THE TRUST—THE DEPARTMENT OF THE INTERIOR

Chapter I

RELATIONSHIP BETWEEN INDIAN TRIBES AND THE PRIME AGENT FOR THE TRUST—THE DEPARTMENT OF THE INTERIOR

An understanding of the relationship between Indian tribes and the Bureau of Indian Affairs, which functions as the prime agent for the Federal trust responsibility, is essential to an understanding of Indian affairs. The Task Force on Tribal Government is aware that at least two other task forces will be scrutinizing aspects of this relationship. The Task Force on Trust Responsibility and Treaty Review undoubtedly will be examining the relationship to determine what changes should be recommended in Federal law and policy as applied to the nature of the trust relationship. The Task Force on Federal Administration also has the responsibility to examine this relationship from the perspective of structural problems in the administration of the Federal responsibility towards Indian tribes. The Task Force on Tribal Government's distinct perspective has been to look at this relationship from the viewpoint of the Tribal Government itself in order to identify problems and arrive at recommendations for change.

While Chapter III of this report discusses task force findings in the area of delivery of services by the Bureau of Indian Affairs to tribal governments and, in particular, Bureau actions taken to implement grant provisions of the Indian Self-Determination Act of 1975, this chapter will focus on the relationship between the BIA and the tribes as governments.

Historically, the paternalistic authority that was exercised in the past by BIA officials over the tribal government is well documented.[1] Relying upon the "guardian-ward theory", Federal officials have exercised heavy-handed control over Indian tribes and in effect supervised the day-to-day operations of government in a manner that can be accurately compared to a colonialistic system.[2]

Present status of BIA-Tribal Government relationship

The past twenty years have seen a gradual evolution in this relationship although significant remnants of BIA control over Indian Tribal Governments remain and will be addressed in some detail in this section. In general, however, the BIA has been evolving into a service agency with Indian tribes, assuming more and more control and direction for the remaining service functions it performs. The task force found wide variations in the relationship between tribes and the BIA, with some tribes assuming a more assertive role[3] in

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[1] "The Problem of Indian Administration," edited by Lewis Meriam (Baltimore: John Hopkins Press, 1928).

[2] Cahn, E.: "Our Brother's Keeper: The Indian in White America," World Publishing Co. (1970); Cohen, F.: "Erosion of Indian Rights 1950–1953; A Case Study in Bureaucracy," 62 Yale L.J. 348 (1953).

[3] Appendix I; Chapter 1 (generally).

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influencing the relationship, with the result that the BIA functions almost as an integral part of the tribal governing system. However, a significant number of tribes still rely on BIA officials to assume total responsibility for such basic functions as law enforcement, judicial services, education and other various social welfare programs.[4] In some instances, the BIA exercises total responsibility for land use control and management of natural resource development on the reservation.

The consensus of tribal opinion, as identified by the task force, is that there is need for change in Federal law and policy defining the relationship between the BIA and the Tribal Government. By and large, Indian tribal leaders are very aware of the fact that existing Federal law provides for an overly broad range of authority on the part of BIA officials over tribal governments. The task force received testimony calling for a change in the law which would define clear limits to the Interior Department and BIA officials' authority to supervise, disapprove or veto tribal governmental actions.[5]

The practical nature of problems resulting from this residue of BIA authority over tribes was not difficult to document.[6] In recent times, the pattern has been that BIA and Interior Department officials have not exerted the power over tribes that they could exercise primarily because of the tribe's increasing level of political sophistication. For example, authority exists in title 25 of the United States Code for the Secretary of Interior to condemn tribal lands of non-IRA[7] tribes without tribal consent for the purposes of establishing rights-of-way for road construction, power lines, etc. However, as a practical matter, it is rare to find the BIA exercising this authority. Yet, the fact that the law remains on the books, and that tribes do not have the authority to stop such a condemnation action, disturbs many tribal leaders who would unquestionably support a move to limit such authority by appropriate change in the law.

Source of BIA authority over Tribal Governments

In general, BIA authority over tribal governmental actions springs from two separate sources. Clearly, the trust responsibility of the Federal Government, as exercised by BIA officials, requires that they have authority to control the use, management and disposition of tribal trust resources or income from trust resources. The theory for this source of authority is not viewed as objectionable by the tribes. They recognize that under the law, one simply cannot be a trustee and at the same time have no control over the corpus of the trust. If Indian Tribal Governments were to be recognized as possessing ultimate control over the use and disposition of tribal trust resources, then under the law, there is no way that the Federal Government could be held responsible. In effect, this would imply a termination of the trust responsibility.

The other source of authority for BIA control over the actions of Tribal Governments can be found in tribal constitutions wherein

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[4] Appendix I; Chapter 2 (generally).
[5] Appendix I; Chapter 1, pp. 1–3.
[6] Note 5 Supra.
[7] Indian Reorganization Act (Wheeler Howard Act of 1934).

Indian tribes themselves have conferred authority on the Secretary of the Interior to approve or disapprove a wide variety of tribal governmental actions. As part of its research efforts, the task force reviewed all available copies of tribal constitutions and found that a majority of these documents define or grant authority to the Secretary of the Interior to review or approve various exercises of tribal governmental authority.

The reason so many Indian tribes conferred this authority to the Secretary of the Interior is due to a unique set of historical circumstances. Relatively few Indian tribes functioned on the basis of written constitutions or parallel documents at the time that the Indian Reorganization Act was enacted by the Congress. The great majority of Indian tribes simply were not constituted or organized along the lines of a representative constitutional democracy which was the model spelled out in section 16 of the Indian Reorganization Act.[8] A great many Indian tribes drafted and adopted written constitutions in the decade following enactment of the IRA, and in nearly every case, they were advised extensively by Interior Department officials in the drafting of such documents. In fact, Interior Department officials had drafted a model or "form" constitution which contained the language granting authority to the Secretary of the Interior to approve or disapprove a wide variety of tribal governmental actions. Sometimes with only slight variations or modifications, this "form" constitution was adopted by the great majority of Indian tribes. In fact, today a great many tribes still retain the model IRA constitution and several generations of tribal leaders have served in tribal governments organized and structured along the lines of this model constitution. By far, the great majority of Indian tribes who function under variation of the IRA model are very aware of its deficiencies and are in the process of modifying or amending their constitution.[9]

BIA or Interior Department authority over the actions of Indian Tribal Governments grounded upon provisions found in tribal constitutions must be viewed as a matter which concerns the individual tribe and is not an issue of Federal policy. Even though the Interior Department officials were responsible for drafting the model IRA constitution and for encouraging tribes to adopt constitutions which contained the "boilerplate" provision granting authority to the Secretary of Interior, it is clear that the tribes are not required under Federal law to submit their governments to this broad range of supervisory control. In recent times, a significant number of Indian tribes have amended their constitutions to delete completely any requirement that the tribal government submit any form of tribal action to the Secretary of Interior for his review and approval. Consequently, today it remains a matter of tribal initiative whether to allow for Secretarial review and approval of tribal action through their constitution or change their law to be completely free of such tribally-conferred Federal supervision.[10]

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[8] 25 U.S.C. Section 476.

[9] Appendix I; Chapter 2. pp. 7 and 14.

[10] A potential obstacle to amending tribal constitutions is that nearly all IRA and non-IRA constitutions drafted with BIA supervision, contain a provision requiring Secretarial approval of tribal resolutions or ordinances.

Problems in the nature of secretarial authority over Indian tribes related to the trust responsibility

Independent of tribal constitutions or other documents defining the relationship between the tribal government and the BIA and Interior Department, a number of provisions remain in title 25 of the United States Code which give the Secretary of Interior authority over tribal actions over and above what may logically be required by the trust responsibility.[11] Attached to this section of the report is a research memoranda which was commissioned by the task force and which analyzes in detail existing law and regulations pertaining to the relationship between the Tribal Government and Department of Interior officials.[12] Based on the analysis of our research, the task force has concluded that the best approach is to distinguish between sources of Interior Department authority over tribal governments which are founded or grounded in the trust responsibility, and sources of authority over tribal governments which are not grounded in such responsibility. Based on this distinction, the task force is recommending that existing law be changed to clearly limit Secretarial authority over actions of Tribal Governments to those instances wherein the trust responsibility is directly involved. Essentially, this means that the Federal policy ought to be based on a recognition of what is required by the trust responsibility and what is consistent with a recognition of the rights of self-government on the part of Indian tribes.

Need to supervise Indian tribes is justification for BIA authority

In the past, Federal policy was based on a desire to continue to supervise tribal governments.[13] The rationale for this supervisory responsibility was articulated by BIA Commissioner John Collier in testimony to the Congress in hearings on the proposed Indian Reorganization Act.[14] At that time, federal officials believed that Indian tribes were relatively uneducated in the process of operating constitutional forms of government, and that therefore, the role of the Federal official would be that of an educator. At the same time, Federal officials were aware that the Supreme Court had concluded that Indian Tribal Governments were outside the scope of the U.S. Constitution.[15] Consequently, there was some sense that continuing authority on the part of the Interior Department officials was justified, to insure that Indian Tribal Governments did not engage in practices or exercise their authority in ways which would be repugnant to basic principles found in the Bill of Rights of the U.S. Constitution. Since the Federal courts had concluded that there was no basis under the law for judicial review of tribal government actions contrary to the standards set out in the U.S. Constitution, some justification was seen for administrative officials to have authority over Indian Tribal Governments, to insure that they did not stray too far from the path of democracy as spelled out in the Constitution and as required of Federal and State governments.

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[11] For example, see 25 U.S.C. Section 81 (Contracts with Indian tribes or Indians); and 25 U.S.C. Section 262 (Persons permitted to trade with Indians).

[12] Appendix VII; Legal Analysis of Indian Reorganization Act.

[13] Note 1 Supra.

[14] Hearings on S. 2755 and S. 3645 Before the Senate Subcommittee on Indian Affairs, 73rd Congress, 2nd Sess. (1934).

[15] *Talton v. Mayes*, 163 U.S. 376 (1896).

Regardless of whether or not one may agree with this justification, clearly, Secretarial authority was completely undercut when the Congress enacted the 1968 Indian Civil Rights Act. That law requires that Indian Tribal Governments observe the rules of due process and equal protection in their exercise of self-governing powers. Federal courts were given jurisdiction under the Indian Bill of Rights to review the actions of Indian Tribal Governments and protect the rights of individuals who were within the authority of Indian tribes. Federal court opinions interpreting the Indian Bill of Rights demonstrate that virtually no form of tribal governmental action is beyond the scope of Federal court review under the Indian Civil Rights Act.[16] Consequently, there is no longer any room for a theory supporting a supervisory role on the part of Federal administrative officials over Indian tribes.

Amendment of Indian Reorganization Act

The Tribal Government Task Force has determined that it is necessary to amend the Indian Reorganization Act, in order to restrict the authority of the Secretary of Interior over Tribal Governments to areas directly related to his trust responsibility. In surveying the development of the law insofar as it defines the political status of Indian tribal governments, the task force concluded that the IRA has been the only statement by the U.S. Congress directly addressing the question of the status of Indian Tribal Governments.[17] Historically, it is clear that the prime rationale behind the Indian Reorganization Act was the desire on the part of Congress to reverse the allotment policy which at that time was the prevailing Federal policy towards Indian tribes.[18] The legislative history of the IRA demonstrates that Congress was clearly convinced that the allotment policy was essentially a failure and that the cumulative disastrous effect that the policy had had on Indian tribes called for a drastic change. Not content with simply amending various allotment statutes to bring an end to the allotment process. Congress was also convinced at the time, that a more positive Federal policy encouraging Indian tribes to develop their governments was called for. Consequently, in addition to putting an end to the allotment policy and extending the trust period on the remaining Indian and tribal lands, Congress included Sections 16 and 17 of the Act, which expressly recognize the right of Indian tribes to organize their governments by adopting constitutions which, "shall also vest in any such tribe or its tribal council the following rights and powers: to employ legal counsel, to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe and to negotiate with the Federal, State and local governments." [19]

The act prefaced this express recognition of the rights to be recognized in Indian tribes with the following general savings clause: "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest . . ." [20] Thus, Congress not only clearly conceded that existing law recognized inherent powers vested in Indian tribes, but also affirmatively defined certain rights which tribes could exercise pursuant to constitutions adopted under the act.

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[16] See, "Indian Civil Rights Act", Manual of Indian Law, American Indian Lawyer's Training Program (June 1976).

[17] Appendix II: Historical Summary of Federal Policy Regarding the Independent Status of Indian Tribal Governments.

[18] Note 13 Supra; and Appendix VII; Legal Analysis of Indian Reorganization Act.

[19] Note 7 Supra.

Shortly after enactment of the law, the Solicitor for the Interior Department wrote an opinion entitled "Powers of Indian Tribes," wherein he summarized the powers recognized in Indian tribes by existing authorities.[21] In effect, the opinion of the Solicitor pointed out that there was a certain redundancy in the IRA. The redundancy lies in the fact that existing Federal law recognized a plethora of powers that Indian tribes could exercise. In fact, nearly every conceivable governmental power necessary to maintain tribal existence as an independent political entity had already been recognized by existing law prior to enactment of the IRA. The only limitation on the powers of Indian tribes under existing law was, and still is, an express limitation by the Congress. Indeed, among the powers recognized by existing law on the part of Indian tribes was the power to create and define the nature of the Tribal Government. That is, prior to the IRA, tribes were already recognized as having the power to adopt constitutions and by-laws if they should so choose.

IRA conferred authority on tribes to prevent sale of tribal lands by the Federal Government

Upon analysis, it is clear that the most significant power vested in Indian tribes pursuant to their adoption of an IRA constitution was the power to "prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe." [22] Since existing law had recognized that Congress' authority over Indian tribes was plenary, the Congress had authority to pass a law calling for the sale, disposition, etc. of tribal lands and the Congress would not have had to condition such sale or disposition of tribal lands upon the consent of the tribe.[23] Tribes who adopted IRA constitutions (less than a majority of all federally recognized Indian tribes) received a protection against unilateral action of the Federal Government condemning their lands rather than an affirmative grant of powers of self-government.

Federally-chartered corporation (25 USC 177) provision deemed irrelevant

Section 17 of the IRA authorized the tribes to establish federally chartered corporations and was intended by Congress to establish a device through which tribes could engage in economic activity. The act also created a revolving loan fund which Indian tribes could participate in, only if they established charter corporations pursuant to section 17 of the act. The revolving loan fund has long since gone out of existence, and statutes which have taken its place—among which is the recently enacted Indian Financing Act [24]—do not make tribal participation conditioned upon establishment of a section 17 corporation. Recently, the Solicitor's office concluded in an opinion that Indian tribes had authority to establish corporations to engage in all manners of economic activity independently of the Indian Reorganization Act.[25] Consequently, section 17 becomes almost totally irrevelant, and the task force recommends deletion of this law by the Congress with an appropriate savings clause for tribes now under section 17 who may desire to continue reliance on their section 17 chartered corporations.

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[20] Note 7 Supra.

[21] 55 I.D. 14 (1934).

[22] Note 7 Supra.

[23] For rights-of-way and other purposes, the United States has authority to sell land without tribal consent. See, 25 U.S.C. Section 311 et. seq., But see, 25 U.S.C. Section 324.

[24] 25 U.S.C. Section 1451 et. seq.

Positive aspects of IRA should be retained and extended unilaterally to all tribes

In our analysis, it seems clear that the IRA, other than in its provisions which halted the allotment policy, is of limited significance. The task force engaged in field research efforts to determine whether there were any remaining practical differences between the relationship of an IRA tribe to the Interior Department and the relationship of a non-IRA tribe.[26] The results of this research reinforced our feeling that there is little practical significance to sections 16 and 17 of the IRA. Our research revealed that there is practically no discernable difference in the treatment or relationship of an IRA tribe and the relationship of a non-IRA tribe to the Federal trustee. The attached legal analysis of the IRA and related statutes further substantiate this conclusion.[27] In fact, what grows out of our research on the IRA is that the provisions which ended the allotment policy, defined a right of Indian preference, and provide for indefinite extension of the trust status of tribal lands, are all extremely positive elements of the Federal law. If the provision in section 16 which requires tribal consent before the Federal Government attempts to sell, lease or otherwise encumber tribal lands or interests was to be extended unilaterally to all tribes rather than be conditioned upon tribal acceptance of IRA constitutions, the law would be totally acceptable. Later in this chapter, we will specifically identify how this positive change in the law can be accomplished.

Historical policy basis of IRA should be clarified

The legislative history of the IRA makes it clear that the Administration, in introducing this law, definitely viewed it as a means of eventual assimilation of Indian tribes into the dominant society.

Testimony by Administration witnesses and in particular former Commissioner John Collier, clearly interpreted the intent of the law as encouraging Indian tribes to adopt forms of government which are close to that of the dominant society.[28] They anticipated that Indian tribes, upon becoming accustomed to living under governments which were parallel to those of the Anglo society, would then gradually cease to have any desire to live as separately-constituted societies. Certainly, the act does not express this concept in so many words; however, if one were to go to the legislative history to determine what the intent of the law was, this policy would be on record. It goes without saying that the task force views this policy as being completely in conflict with the policy described in the introductory statement of the report—which would recognize a permanent right of independent political autonomous existence on the part of Indian tribes. Correction of such a deficiency in the IRA could be easily accomplished by a redefined expression of Congressional policy in a proposed amendment to the IRA. Because the IRA is the only express congressional pronouncement on the status of Indian Tribal Government, such a policy statement clarifying the position of Congress is called for.

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[25] Solicitor's Opinion M-36781 (August 25, 1969).
[26] Note 11 Supra.
[27] Note 25 Supra.
[28] Note 13 Supra.

The significance of the Indian Reorganization Act in the relationship between Indian tribal governments and the Department of Interior as the prime trustee is crucial to an understanding of the nature of the problem that has been identified by the task force—the problem being a continuing basis of authority in the law for the Interior Department to supervise and, in effect, control Indian tribal governments in their actions over and above the necessary control which should accompany the trust responsibility.

Problems in the nature of the Secretary's discretionary authority over tribes

At this point, we would like to take brief note of sections 2 and 81 of title 25 of the United States Code. In its entirety, section 2 of title 25 reads:

> *Duties of Commissioner.*—The Commissioner of Indian Affairs shall, under the direction of the Secretary of Interior, and agreeable to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relationships.

In relevant part, section 81 of title 25 reads:

> *Contracts with Indian tribes or Indians.*—No agreement shall be made by any person with any Indian tribe of Indians, or individual Indians, not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or a thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: * * * second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it.

Based on our research, the task force has focused primarily upon these two sections within the Code which have consistently been interpreted as the basis of Secretarial authority over Indian tribes other than in relation to his trust responsibility authority. Section 2 is a simple and broad statement that the Commissioner of Indian Affairs under the Secretary of Interior shall have the management of all Indian affairs and of all matters arising out of Indian relations. In a Solicitor's opinion written in the 1930's, the Interior Department concluded that section 2, by and of itself, did not give any direct authority to the Secretary of Interior, but that section 2 must be read in conjunction with any other expressed grant of authority.[29]

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[29] 53 I.D. 103 (August 24, 1942).

However, the Interior Department has taken the position from time to time and has relied on section 2 as the ultimate repository of authority delegated by the Congress to the Interior Department. The task force recommends that section 2 be interpreted simply as an enabling statute which necessarily must be tied to an express grant of authority by the Congress to the Secretary as it may be exercised over Indian tribal government.

Our objection to section 81 is that it is needlessly broad and that Secretarial approval of contracts entered into by Indian tribes should only relate to contracts which in one way or another call for use, disposition of trust income, or assets. Certainly, there are other broad statutes which are poorly drafted or statutes which give the Secretary non-trust-related authorities over Indian tribes which do not call for tribal consent. The analysis of these statutes will be addressed by the Task Force on Indian Law Revision, Consolidation and Codification. The primary concern of this task force is to articulate limits to the Secretary's authority over Indian tribes. We simply do not see any basis for the Secretary to have authority over Indian tribes other than as related to his role as trustee.

In relation to the Secretary's role as trustee, we have commissioned an additional legal memoranda which attempts to identify appropriate guidelines and standards for the exercise of this discretionary authority over Indian tribal governments.[30] The task force recognizes that the trustee necessarily must have broad authority and discretion; however, we find inconsistency in overall Federal policy which vests authority in the trustee to veto tribal actions in relation to the trust use management or disposition, but does not provide for any standards by which Secretarial actions can be judged. We recognize that it is basic to the nature of a trust relationship that the Secretary have ultimate authority, but such authority ought not go beyond the reach of administrative guidelines and standards. The appendiced legal memoranda provides a more detailed analysis and suggests such standards and recommendations. Specific recommendations on this point will be included in the recommendations section of this chapter.

There remains one other broad area concerning the relationship between the Secretary of the Interior and Indian Tribal Government. In the past, in a significant number of cases, the Secretary of Interior has been called upon to exercise authority to recognize or not recognize any given tribal council.[31] This variation of the Secretary's authority is traditionally called into play when he is confronted by an Indian tribe wherein the tribal council is not able to effectively govern the tribe. In some instances, there are two factions, each claiming to be the legitimate tribal council or legitimate representative of the tribe. The Secretary has been called upon to choose either one or the other or to initiate action which would call for a general election by the tribe. The task force recognizes that the Secretary of Interior, as the trustee, ultimately has to determine with whom he must deal within the tribe regarding his administration of the trust. In a great majority of cases, there is no problem as there is a continuity within the Tribal Government, and the tribal constitution or bylaws generally spell out how the tribe is to elect its leaders. If leaders are not elected in accordance with the tribal constitution, then clearly, there is a right under the Indian Civil Rights Act due process clause to call into play the review authority of the Federal court system. With regard to this issue, the task force would simply like to point out that this authority of the Secretary to withdraw his recognition from any given Tribal Government ought to be exercised only in the most extreme sorts of circumstances.

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[30] Appendix VIII: Analysis of Administrative Discretion of Secretary of Interior Regarding Delegated Authority Over Indian Tribal Trust Resources and Income.

[31] Exhibit 4: Prairie Band of Potawatomi and Kickapoo disputes.

The task force's special recommendation on this issue will, of course, be contained in the recommendation section of this chapter, but the general thrust is that the Congress should reaffirm the responsibility of the Interior Department to determine who within the tribal government the trustee will recognize, but reserve this authority for the most extreme sorts of circumstances. Any exercise of such authority ought to be accomplished by complete findings of facts supported by evidence.

Recommendations

Chapter I recommendations call for changes in the Indian Reorganization Act and related provisions of Title 25, United States Code. Three purposes to be achieved by the following series of recommendations are: (1) Repudiation of the assimilationist policy implict in the Indian Reorganization Act, as reflected in the record of hearings, many reports, and floor debates on the proposed Indian Reorganization Act, in favor of congressional statement of policy affirming the right of Indian tribes to exist as permanent, independent political units with the correlative right to define the nature and structure of tribal governments in a manner consistent with each individual tribe's unique cultural and traditional community values. (2) To extend the positive benefits incorporated in the Indian Reorganization Act to all federally recognized Indian tribes, regardless of their historical rejection or acceptance of the IRA. (3) To distinguish and define the nature of the authority to be exercised over Indian Tribal Governmental actions by the prime agent of the trust relationship, the Department of Interior. The Tribal Government Task Force thereby recommends that:

1. A statement of congressional findings and policy be adopted to the effect:

    a. that Congress has found that historically, the choice presented to Indian tribes regarding acceptance or rejection of the Indian Reorganization Act has placed an unfair burden upon the Indian tribes inasmuch as they were asked to choose between coming under the total provisions of the IRA without an adequate opportunity to totally understand the implications, or, to totally reject the act.

    b. that Congress has found that the choice should only have been addressed to sections 16 and 17 of the Indian Reorganization Act, providing for adoption of constitutional governmental forms and federally chartered organizations.

    c. that Congress has found that section 2 of the Indian Reorganization Act, providing for definite extension of the period of trust for Indian lands; and section 5, providing for acquisition of

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lands, water rights or surface rights and providing authority for the United States to place such re-acquired lands in trust; and section 10, providing for establishment of a revolving loan fund; and section 12, providing for preference in employment for Indians; and section 19, providing for recognition of "Indians" on the basis of membership in recognized Indian tribes—should all have been applied to Indian tribes, regardless of their acceptance or rejection of sections 17 and 18 of the act, providing authority for incorporation and establishment of federally chartered organizations.

d. that Congress finds that the only authority which the Secretary of Interior should exercise over the actions of Indian tribal governments which is consistent with the recognition of Indian tribal rights of self-government should be confined to the Secretary's responsibility to protect trust assets and resources of the Indian tribes. All other exercises of administrative authority over the actions of Indian tribal governments cannot be justified with any duties of guardianship. It will continue to be the responsibility of the Secretary of Interior to protect the trust resources and assets of Indian tribal governments, but Secretarial authority to disapprove any tribal proposal regarding the use of trust assets should only be exercised after a written expression of findings that such proposed tribal action will endanger the trust.

e. that Congress further finds that the implicit policy of the Indian Reorganization Act which looks forward to the eventual assimilation of Indian tribes into the larger United States society is viewed as inconsistent with congressional policy respecting the rights of Indian tribal governments to exist as independent political units on a permanent basis, so long as the tribal community chooses.

Accordingly, the Tribal Government Task Force recommends:

1. that section 18 of the Indian Reorganization Act (25 USC 478) will be repealed and instead, the following savings clause should be inserted:

> Any Indian tribe which has chosen to organize under Sections 16 and 17 of the Indian Reorganization Act rights shall not be affected. Section 17 of the Indian Reorganization Act (25 USC 477) shall be repealed with the same savings clause as applied to Section 18.

2. Section 16 of the Indian Reorganization Act (25 USC 476) should be amended to state:

> The rights to choose their natural form of government is the inherent right of any Indian tribe. Amendments to tribal constitutions and bylaws adopted pursuant to the Indian Reorganization Act shall be ratified and approved by the Secretary to protect the trust assets and resources of the tribes.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, said Indian tribe shall also be recognized to have the following rights and powers: To employ legal counsel, to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the Secretary; and negotiate with the Federal, State and local governments. The Secretary of the Interior shall advise all Indian tribes and/or their tribal councils of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submmission of such estimates to the Office of Management and Budget and the Congress.
>
> Notwithstanding the provisions of any existing tribal constitution or similar document which vests authority in the Secretary to review and approve or dis-

approve proposed actions of said Indian tribes, Indian tribal governments, the Secretary's authority over Indian tribes can only extend or be directly related to the trust responsibility over the use and disposition of trust assets.

In addition, the Tribal Government Task Force recommends:

1. that 25 U.S.C. 2 be amended to include the following language:

> **"The authority of the Secretary of Interior over Indian tribes shall only extend to these actions deemed necessary to protect tribal trust assets and resources. In any action which the Secretary finds it necessary to disapprove a proposed tribal government initiative, the Secretary shall take such action within 60 days of having been officially notified of the proposed action by the Indian tribal government and any disapproval of the proposed tribal action shall be accompanied by an opportunity for a hearing on the part of the tribe, and the Secretary's decision shall be based on written findings of fact which shall specify the reasons for his disapproval.**

2. that 25 USC 81 be amended in the following manner: The third paragraph beginning "second . . ." shall read:

> **It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it. The Secretary of the Interior and the Commissioner of Indian Affairs shall disapprove any such proposed contract only after finding that the proposed contract shall endanger the trust assets or resources of the tribe or individual Indian. Such findings shall be submitted to the proposed tribe and/or Indian in written form specifying the exact reason for disapproval.**

CHAPTER II

TRIBES AS GOVERNMENTS—PROBLEMS IN THE EXERCISE OF SELF-GOVERNING AUTHORITIES

Chapter II

TRIBES AS GOVERNMENTS—PROBLEMS IN THE EXERCISE OF SELF-GOVERNING AUTHORITIES

For the past 200 years, Federal law has recognized the right of Indian tribes to function as governments in nearly every sense of the term.[1] However, the Tribal Government Task Force has found that there continues to be a great deal of misunderstanding and a general lack of information regarding the status of Indian tribes as governments.[2] Based on our extensive field research, the task force has found that, in general, Indian tribes do indeed function as full-fledged governments. Our analysis of the present status of Indian tribes has confirmed that the great majority of Indian tribes have organized governments which truly govern the community of people who reside on Indian reservations, exercising varying degrees of control over the commerce and territory of the reservation.[3] Based on our documentation, Indian tribal governments do in fact regulate society within their political and geographical boundaries. Tribes exercise general police powers. They provide judicial and law enforcement systems for the reservation and for the reservation communities. Tribal Governments enact laws, both criminal and civil, for the purpose of maintaining law and order in society, and regulating commercial and industrial activity on the reservation. Tribal Governments have established licensing requirements for a variety of commercial activities, and have set standards regulating the conduct of such activity.[4] More and more, Tribal Governments have been attempting to regulate all manners of land use on the reservation, including development and management of natural resources. Tribal Governments have exercised their authority to impose taxes for the purpose of raising revenue to support the exercise of Tribal Government.[5]

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[1] That Indian tribes do exercise sovereign powers was first recognized by the U.S. Supreme Court in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 350 (1832), and reaffirmed in numerous Supreme Court cases since, e.g. *Mackey* v. *Coxe*, 59 U.S. (18 How.), 100 (1855); *Ex Parte Crow Dog* 109 U.S. 556 (1883); *Jones* v. *Meehan*, 175 U.S. 1 (1889); *Delaware Indians* v. *Cherokee Nation*, 193 U.S. 127 (1904); *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); *United States* v. *Quiver*, 241 U.S. 602 (1916); *Morris* v. *Hitchcock*, 194 U.S. 384 (1904); *Williams* v. *Lee* 358 U.S. 217 (1959).

[2] Exhibit 5; "Non-Indians Organize Opposition to Tribes", NCAI Bulletin, Spring, 1976; "Judge asks Governor to Discard Law, Treaties", "The Medicine Bundle", Vol. III, No. 2, March, 1976. Also see, Exhibit 2.

[3] Appendix XVIII; Task Force Field Consultant Reports.

[4] Solicitor's Opinion, 55 I.D. 14 (1934) concluded that the powers vested in an Indian tribe are not delegated powers granted by express acts of Congress but "inherent powers of a limited sovereignty which has never been extinguished", 55 I.D. at 19. See also, M–36781 (August 25, 1969). Solicitor's memorandum on tribal authority to charter corporations. Case law following *Worcester*, note 1 Supra., has supported tribal authority to tax as a logical exercise of sovereignty. *Iron Crow* v. *Oglala Sioux Tribe*, 231 F. 2nd 89 (8th Sir., 1956); and refused state pre-emption arguments as contrary to the exercise of tribal jurisdictions to tax the sale of liquor on reservations. *U.S.* v. *Mazurie*, 96 S. Ct. 710 (1975).

[5] For a discussion on the interface between state and tribal taxation powers in New Mexico, see "Taxation and Indian Sovereignty"; A Study by the American Indian Law Center, University of New Mexico (1975).

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Distinctive features of Tribal Government

In addition to this inventory of political powers and responsibilities exercised by Tribal Governments, as documented extensively in our research, the task force has identified several important areas whereby Tribal Governments can be distinguished from non-Indian units of local government.[6] In general, we found that each tribe has retained, in varying degrees, traditional, cultural, and religious societal practices which influence the manner and form in which the tribal government is operated.[7] Cultural characteristics unique to Indian tribes are also individual, in the sense that each tribe has its own individual practices, and these practices affect the exercise of tribal government in their own unique way. For example, the Plains tribes, who are in general nomadic people, traditionally existed on a subsistence economy, based on their practice of hunting and food gathering. Their traditional practices and cultural beliefs are clearly distinguishable from the Pueblo tribes, who have an entirely different cultural background. The Pueblos were not nomadic people, but rather settled for centuries in one area, and subsisted primarily on an agrarian economy.

The beliefs and cultural practices of each community influence the community's view of what the role of government should be, and how the powers of government should operate. This influence is in some cases, very subtle, and in other cases, very direct. However, the task force found that in general, nuances of this cultural influence on the manner and exercise of tribal governing powers, ultimately was not relevant or reduceable to the level of task force recommendations.[8] While it is true that these considerations point to problems in the sense that tribes have evolved governmental systems which are not completely parallel to the governmental systems we find in the general society, the nature of differences in tribal systems are internal matters which are a responsibility of the tribal community, and not a responsibility of the Federal Government.[9]

Right to define the nature and form of government

It is the conclusion of the Tribal Government Task Force that it is a continuing responsibility of the Federal Government to recognize one of the most basic rights of Indian tribes: the right to define the nature and structure of the Tribal Government. This elementary right has been repeatedly recognized in Federal law, and should constitute prevailing policy influencing the congressional view of the total Federal-Indian relationship.[10] Nevertheless, the task force has identified a tendency on the part of Congress and the executive branches of government, to expect Indian tribes to act in precisely the same manner as non-Indian governmental systems.[11] This tendency is manifested, for example, in the regulations developed by the various Federal agencies for the administration of Federal domestic assistance programs. Such regulations impose standards of governmental uniformity on tribal governments as a condition for participation in Federal domestic assistance program benefits, and are inconsistent with Federal policy which recognizes the right of tribes to form unique governments. This issue will be dealt with in more detail in chapter IV.

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[6] Exhibit 6: *Indian Tribes as Governments*, American Indian Lawyer Training Program, In. (1975).

[7] Appendix XVIII; Task Force Field Consultant Reports.

[8] Note 7 Supra.

[9] *Pueblo of Santa Rosa* v. *Fall*, 272 U.S. 315 (1927); Implicit recognition of a tribe's power to choose a non-constitutional form of government: *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F. 2d 1140 (8th Cir., 1973); Requirement of exhaustions of tribal remedies in civil action before Federal Court jurisdiction invoked under the 1968 Indian Civil Rights Act, 25 U.S.C. Section 1301–1303 (1970).

[10] See, "The Scope of Tribal Self-Government", Chapter Seven, Felix Cohen, "Handbook of Federal Indian Law", the 1942 Edition as republished by the University of New Mexico Press.

Membership rights

One important aspect of the right of Indian tribes to define and establish their own systems of government is the right to establish standards for membership in the tribe. No other political unit in the Federal system conditions citizenship rights on descendancy from a specific ethnic or racial group. However, as the U.S. Supreme Court has recently pointed out in the case of *Morton* v. *Mancari*, Indian membership rights and the political rights which follow membership, are unique in the Federal system, but nevertheless, have withstood the test of Federal law.[12]

Present status of Tribal Governments

The period of years following the passage of the Allotment Act of 1887 saw the deterioration and eventual disappearance of many Tribal Governments. The Allotment Act had transferred control of Indian lands from the tribe to the Federal Government. As the administrator of allotments, the Indian agent began to compete with tribal officials for the loyalty of the Indian people. The power of a local agent was pervasive—he controlled the issuance of food and supplies promised in treaties, and was responsible for allotted lands held in trust. By the early 1900's, the Indian Office, through the local agent, exercised almost absolute control over the reservation, sometimes replacing the legitimate tribal officials as the governing authority, despite the absence of statutory authorization for such interference.

With the passage of the Indian Reorganization Act of 1934, Indian people found themselves forced to decide whether or not to adopt a constitutional form of government, a concept wholly alien to almost all tribes, except perhaps the Iroquois Confederacy and the Five Civilized Tribes.

In 1976, forty-two years after the passage of the Indian Reorganization Act (IRA), many Indian people are just beginning to view their tribal governments as legitimate, functioning governments.[13] In spite of the paternalism of the Bureau of Indian Affairs, and limited tribal resources, Indian leaders perceive a very pressing and critical need to develop governments which will be able to exercise the full array of powers and to develop the capability of delivering a wide range of governmental services to their tribal communities.

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[11] Appendix I; Chapter IV.

[12] 417 U.S. 535, 551–552 (1974) *Mancari*, reaffirmed the validity of the Indian Reorganization Act provision calling for preference to qualified Indian applicants in Bureau of Indian Affairs job vacancies. See also, The President's Message to Congress on Indian Affairs, July 8, 1970, six Weekly Compilation of Presidential Documents, part 3, 894 (1970).

It should be noted that rights that accrue to Indians are not conditioned on ethnic origin but on tribal membership and as such are political rights, although membership is almost universally conditioned on ethnic origins. The importance of *Mancari*, supra, cannot be overstressed because it recognizes in the second half of the twentieth century, that tribes are political entities with their citizens entitled to rights based upon tribal membership.

[13] See Appendix XVIII; Cheyenne-Arapaho Field Report.

Time and again in task force meetings and hearings held over the past year, tribal leaders have stressed their sense of the need to rapidly develop tribal governments with the capability of exercising political powers which would truly regulate all facets of society, land use, and commerce on the reservation. Tribal perceptions of the need for governmental development center on two primary considerations. First, tribes realize that they are in a battle for jurisdiction with the states, and to a lesser degree, with the Federal Government. It is commonly perceived that if tribes do not aggressively and effectively exercise their powers of self-government, there is a tendency for states to usurp or infringe upon the political rights of tribes.[14] States have displayed a growing interest in exercising political authorities within the boundaries of the reservation. Primarily, this interest falls within the general areas of taxation,[15] land use control,[16] law and order,[17] and regulation of natural resource development.[18] Secondly, tribal leaders believe that their ability to protect inherent tribal rights will be enhanced by developing the governmental capacity to regulate land use, taxation, commercial activity, and natural resource development.[19]

Special studies in regulatory powers of tribes

A series of in-depth studies of key issues involved in tribal exercise of self-governing powers was commissioned by the task force. These studies analyze: (1) land use and natural resource development; (2) taxation; and (3) judicial-law enforcement authorities. A case study approach was used to document and analyze successful efforts of tribes known to be exercising tribal powers in an effective and equitable manner. In addition to these case studies, the task force has summarized the status of the law and pointed out the weight of Federal recognition supporting the authority of tribes to exercise these basic governmental powers. The reader is referred to the appendices of this report for the full text of these studies.

Land use and natural resource management

Based on the task force research and case studies, it is quite clear that a tribe must exercise, to the fullest extent possible, the powers to control land use and to regulate natural resource development within the boundaries of the reservation, if the tribe is to operate effectively as a government, and as a government, to protect the very legitimate and basic interests and rights of the tribe as an entity.[20]

In the last session of Congress, bills were introduced in both the House and the Senate, designed to develop a national land use program.[21] As passed by the Senate during the last session of the Congress, the Land Use Planning Act contained a provision recognizing the tribes as the unit of government for the geographical areas of the reservation.[22] The Senate version of the bill was entirely consistent with long-standing Federal policy in recognizing tribal control not only over tribal land, but also over allotments, fee patent land, and rights-of-way within the boundaries of the reservation. However, the House version of the Land Use Control Act did not follow the Senate's lead, and instead, the House Interior Committee proposed that a two-year study be conducted by the Department of Interior, as to the need and capability of Indian tribes to exercise land use controls over all lands within the boundaries of the reservation.[23] Testimony which accompanied this proposal in the bill raised doubts as to the legal authority of tribes to exercise land use powers, particularly over patent lands within the boundaries of the reservation, as well as raising policy questions relative to confirming this basic power of tribes.[24]

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[14] Appendix I; Chapter II (generally).
[15] Appendix I; Chapter II, pp. 12–13.
[16] Appendix I; Chapter II, pp. 10–11, 15–16.
[17] Appendix I; Chapter II, pp. 16–17.
[18] Appendix I; Chapter II, p. 18.
[19] Appendix XVIII; Field Consultant Reports.
[20] Note 16, Supra; and Appendices III and IV.
[21] Known as the Land Use Policy and Planning Assistance Act, S. 268 and S. 924; Senate Report 93–197, 92 Cong. 2nd Sess., June 7, 1973.

Attached to the task force report is a special report on land use control by Indian tribes which documents the considerable authority existing in Federal law supporting tribal exercise of land use powers over all manners of lands to be found within the boundaries of the reservation.[25]

Taxation

A special report on taxation is attached in the appendices of the Tribal Government Task Force Report which documents several instances of effective tribal exercise of taxation powers and effective support of government based on this basic revenue-raising authority.[26] Of particular note is the progressive effort now being made by the tribes in the State of New Mexico. The New Mexico Intertribal Tax Commission, established by the tribes of New Mexico, serves the dual purposes of providing a mechanism for negotiating with the state relative to common tribal-state interests regarding taxation within the boundaries of the reservation, as well as providing a resource and research unit to support tribal efforts in initiating taxation schemes of their own within their respective reservations. One of the basic premises behind the establishment of the Commission by the New Mexico tribes is the common sense recognition of the futility and eventual ineffectiveness of litigation as a means of resolving differences between the tribes and the state as to jurisdictional issues.[27] Unfortunately, the task force is not able to report a particularly responsive attitude on the part of the State of New Mexico. However, there is hope that through persistent tribal efforts, destructive litigation can be diverted, and instead, tribal-state intergovernmental compacts or agreements may prove in the future to be the norm.

The task force taxation report summarizes the legal authority supporting the power of Indian tribes to tax all matters of commercial and other activity within the boundaries of the reservation.[28] In addition, the report refers to several recent studies in the area of taxation which discuss the policy values confirming taxation as a revenue-raising authority of Indian tribes.[29]

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[22] Note 21, Supra.

[23] Land Use Planning Act of 1973; H.R. 10294, House Report 93–798, February 13, 1974.

[24] Note 23, Supra.

[25] Appendix III: A Case Study of Land Management and Land Use Planning in the Quinault Indian Reservation and Appendix IV; *Coal Development v. Crow and Northern Cheyenne Tribes.*

[26] Appendix XIV; Taxation Powers of Tribal Governments—Summary of Supporting Legal Authorities and Appendix XV; Oglala Sioux Tribal Taxation System Case Study.

[27] Appendix XIV.

[28] Note 27, Supra.

In summary, these policy considerations point to the wisdom of encouraging Indian tribes to develop taxation schemes as a means of basic governmental support for the tribe. As more and more tribes devise revenue-raising techniques, there should be a correlative decrease in dependency on Federal support for the basic functions of Tribal Government.

Judicial—law enforcement

Task force studies in the area of judicial authority and law enforcement powers document the experience of the Gila River Indian Community in Arizona.[30] The Gila River Community is nationally known for its progressive and effective judicial system. Particularly, they are known for their experience in asserting and exercising tribal jurisdiction over all matters of criminal offenses by non-tribal members, including non-Indians. The task force believes that the Gila River Community has demonstrated that there is nothing inherently difficult or abhorrent in the concept of Indian tribes asserting jurisdiction over non-Indians within the boundaries of the reservation. In order to truly effectively maintain order within the reservation boundaries, and to protect the rights of individuals residing within the reservation boundaries, the tribal government, through its law enforcement personnel, must be able to enforce laws on the reservation irrespective of the race or identity of an individual violating the law. The Administration, particularly the Interior Department, has equivocated on the issue of jurisdiction over non-Indians in the past. Legal authorities supporting this exercise of elementary tribal power are summarized in this report.

The Tribal Government Task Force has identified a series of Federal statutes which are inconsistent with the basic conception of tribes as fully-functioning governments. These statutes include the Full Faith and Credit Statute, the Indian Civil Rights Act of 1968, the Major Crimes Act of 1885, the Assimilative Crimes Act, and Public Law 83-280.

Problems in the lack of full faith and credit towards Indian tribal law and court judgments

The task force commissioned extensive field and academic research focusing on the problem created for Indian Tribal Governments due to the lack of full faith and credit accorded tribal laws and tribal court judgments. The attached studies document the practical and legal nature of problems resulting from the lack of a requirement under Federal law that state and Federal courts enforce and recognize tribal law and court judgments.[31] Although Felix Cohen concluded in his Federal-Indian law treatise that such recognition was required by Federal law, his analysis has not withstood the test of time.[32] The courts have since reasoned that because Indian tribes were not specifically referred to in either the constitutional full faith and credit clause, or in the statutory interpretation of full faith and credit found in 28 USC 1738, the requirement does not extend to tribal laws.[33] As a result, recognition and enforcement of tribal laws and court judgments is decided on an individual, case by case basis. Some state courts have occasionally accorded recognition to tribal court judgments on a theory of judicial comity, but such recognition has been almost exclusively in the area of domestic relations. Since comity is almost purely a matter of judicial grace, as a practical matter, litigating parties can expect little uniformity and notice, when seeking enforcement of judgments.[34]

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[29] Note 27, Supra.

[30] Appendix XI.

[31] Appendix XIII; Full Faith and Credit Between State and Tribal Courts and Appendix X; Issues in Mutuality—The Existing Relationship Between State and Tribal Courts.

[32] Cohen, F.: "Handbook of Federal Indian Law"; the 1942 Ed. as republished by the University of New Mexico Press.

The task force has concluded that the resultant situation whereby the force and effect of tribal and state court orders and judgments stop at the reservation boundaries is intolerable. The injustice to litigating parties seeking deserved and legitimate redress for serious legal injustices as a result of a system of almost total legal separateness cannot be allowed to continue. Indian tribal governments can never be regarded as an integral element of the total federal system until their laws and court judgments are recognized on a par with those of the state and Federal governments, under the principle of full faith and credit. The task force therefore concluded that there are no compelling policy reasons why Indian tribes should not be included within the scope of 28 U.S.C. 1738. Accordingly, the task force recommends appropriate amendment of section 1738 to include Indian tribes.

The task force recognizes that congressional extension of the full faith and credit requirement to include tribal courts must necessarily be on a reciprocal basis. That is, just as state and Federal courts should be required under Federal law to recognize tribal law and court orders, bilateral recognition of state judgments and laws should also be required of Tribal Governments. The task force has found that the majority of Indian tribes presently provide for recognition and enforcement of state law, even in the absence of a binding requirement under Federal law. Such a practice is generally not regarded as onerous or a backdoor extension of state jurisdiction. However, a natural resentment has been occasioned on the part of tribal government officials when confronted with state refusal to provide reciprocal recognition. Extensive analysis of the legal and practical nature of the problem is included in the reports commissioned by the task force, as well as details of implementation of the full faith and credit principle to include Indian Tribal Governments.

Indian Civil Rights Act

In 1968, Congress, exercising its plenary authority over Indian tribes, enacted the Indian Bill of Rights as part of the Civil Rights Act.[35] In language copied from the Constitution, the Act enumerated specific rights not to be abridged by Tribal Governments. Amendments one and four through eight were incorporated with the following variations: (1) establishment of religion is not prohibited; (2) the right to counsel is guaranteed only at the defendant's expense; and (3) as a complement to the statute's limitation of Indian courts to penalties of six months and $500.00 fines for one offense, there is no right to indictment by a grand jury. In addition, the tribe is prohibited from denying to anyone within its jurisdiction, the equal protection of the law.

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[33] 28 U.S.C. A Section 1738 which codified the full faith and credit requirements adds "territories or possessions of the United States" as well as the states. For a contrary holding see, *Allen Jim* v. *CIT*, 533 P. 2d 751 (1975).

[34] Note 31, Supra.

[35] 25 U.S.C. Section 1301 et seq.

Over the past year, tribal leaders and judges have expressed concern over the arbitrary six month and $500.00 ceiling on tribal court penalties.[36] The legislative history of the Indian Civil Rights Act reveals the drafting committee's confusion between tribal courts and Courts of Indian Offenses. Courts of Indian Offenses are administrative entities under the supervision of the Department of Interior. These administrative courts are viewed as educational devices for tribal governments, as well as misdemeanor courts for those reservations where the tribe does not wish to exercise their right to establish tribal courts. The Code of Federal Regulations prescribes the misdemeanor offenses subject to the jurisdiction of the Court of Indian Offenses and limits the penalties to be imposed to no more than six months and $500.00. The drafting committee incorporated this limitation on penalties into the Indian Civil Rights Act after confusing tribal courts with Courts of Indian Offenses.

Clearly, tribal courts are not the same as Courts of Indian Offenses and there is no natural reason for imposing similar restrictions. The task force recommends that this limitation on the penalty power of tribal courts be deleted from the Act, being totally inconsistent with Federal policy supporting the concept of tribal self-government.

Major Crimes Act

In response to the Supreme Court decision in *Ex Parte Crow Dog*, which held that a Federal district court did not have jurisdiction over crimes committed between Indians of the same tribe, in 1885, Congress enacted the Seven Major Crimes Act.

Specifically, the Major Crimes Act was the result of public opinion expressing outrage that an Oglala court could find a defendant guilty of murder, but only order him to make restitution in the form of services and property to the victim's family. The penalty was fully consistent with traditional tribal practices, but not considered severe enough by the neighboring white settlers.

The act gave territorial courts jurisdiction over enumerated major offenses committed by Indians within a territory, and gave Federal courts jurisdiction over such offenses committed by Indians on reservations within a state.

In the original Act of 1885, the enumerated offenses included: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, committed by one Indian against another. Incest, assault with a dangerous weapon, and embezzlement were added later.[37] In all, there are 13 major offenses which are within the scope of the Major Crimes Act.

Since the passage of the act, a number of Federal court decisions have held that the intent of the act was to withdraw tribal jurisdiction over any of the enumerated felony offenses. Such a limitation on the authority of tribal courts must, in 1976, be deemed inconsistent with a recognized right of self-government. All other units of government—states, counties, and municipalities—are recognized as having varying degrees of felony jurisdiction, and it is only logical to presume that if tribal governments are truly self-governing, they must be recognized as having jurisdiction over criminal offenses, whether they be of the felony or misdemeanor categories.

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[36] Appendix I: Chapter II, pp. 19 and 20.

[37] 18 U.S.C. Section 1153 et seq.

The problem is magnified by the fact that Federal law enforcement and judicial systems are not adequately exercising jurisdiction over these major crimes on Indian reservations.[38] There are repeated assertions by tribal people and tribal community leaders that Federal marshals, prosecutors, and the FBI are very selective in the manner in which they enforce felony laws on reservations.[39] All too often, non-Indians are not prosecuted as vigorously as Indians.[40]

There are a number of tribal courts who are quite capable of exercising this additional jurisdictional responsibility,[41] and at a minimum, tribes should be recognized to possess jurisdiction over all felony offenses.

Assimilative Crimes Act

The Assimilative Crimes Act[42] was enacted to provide for the punishment of offenses committed within or upon Federal enclaves, including Indian reservations, where the offense was not punishable by any act of Congress, but which would be punishable under state law, if committed outside the Federal reservation. The Act was designed to apply state law in Federal enclaves where there was no preexisting applicable Federal statute.

The act is reasonable when applied to the great majority of Federal enclaves such as national parks and forests which have no local government, but is clearly inappropriate and unnecessary when applied to Indian reservations which possess sovereign Tribal Governments. Any vacuum in Federal law could readily be filled by tribal regulations and ordinances. Moreover, a decision by the tribe not to fill in Federal loopholes is no justification for application of state law within the reservation.

Because Indian reservations are included within the provisions of the act. State gambling ordinances, licensing rules, and State hunting and fishing regulations may potentially be applied to Indian country. This extension of state jurisdiction is clearly inappropriate and completely in conflict with the congressionally recognized jurisdictional authority of tribal governments.

There is no express language in the Assimilative Crimes Act which makes it applicable to Indian reservations. In addition, legislative history is completely devoid of any congressional intent to apply state criminal law or state regulatory rules to Indian reservations.

In the absence of any kind of expression of congressional intent. it seems clear that Indian tribes should not fall within the scope of the Assimilative Crimes Act.

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[38] Appendix I: Chapter II, p. 6 and 7.

[39] Note 38, Supra.

[40] Note 38, Supra.

[41] Appendix I; Chapter II, pp. 6 and 7.

[42] 18 U.S.C. Section 13.

Public Law 83–280

The Tribal Government Task Force is fully aware that the Task Force on State, Tribal, and Federal Jurisdiction will be addressing Public Law 83–280 and related jurisdictional statutes in some detail. The concern of this task force is the problems which have been created for tribal governments by this exercise of state jurisdiction.

The Senate proposal to amend Public Law 83–280 (S. 2010) and related statutes, which is now before the Congress, has already witnessed testimony from Indian spokesmen, Federal agency representatives, and State authorities.[43] We would simply add our task force voice, emphasizing the inappropriateness of state jurisdiction over Indian tribes, and the need for congressional attention to resolve what is basically an inconsistency and conflicting policy on the part of the Federal Government toward Indian tribes and tribal governments.

Recommendations

The following series of recommendations by the Tribal Government Task Force is directed to the provisions of existing statutes which directly or indirectly impose limits on the self-governing authority of Indian Tribal Governments in a manner which is inconsistent with the Federal policy recognizing the right of Indian tribes to exist as independent political units within the federal system. Accordingly, the Tribal Government Task Force recommends:

1. that 25 U.S.C. 1302 (commonly known as title II of the 1968 Indian Civil Rights Act) be amended in the following manner: Subsection 7 shall read: "require excessive bail, impose excessive fines, inflict cruel and unusual punishment."

This proposed amendment would delete from section 7, language to the effect that Indian Tribal Government could impose for conviction of any offense, any penalty or provision greater than imprisonment for a term of six months or a fine of $500.00 or both.

2. that title 18 of U.S.C. 13 U.S. Assimilated Crimes Act be amended by the following language to be inserted at the end of the Act to read: "above provisions should not apply to any Indian reservations wherein the Indian tribe is exercising powers of self-government."

The purpose of this amendment is to eliminate the possibility of applying substantive state criminal laws to Indian reservations by Federal law enforcement authorities. This recommendation is based on a finding that the purpose of the Assimilative Crimes Act was solely to fill any possible jurisdictional vacuum caused by the absence of Federal law as applied to the Federal "enclaves" as defined in 18 U.S.C. 7. It is clear that the intent of this law was to give authority to Federal law enforcement officers to apply the criminal laws of the state wherein the Federal enclave was located, but since Indian Tribal Governments rightfully exercise all jurisdiction not pre-empted by the Federal Government within the boundaries of reservations, application of state law is clearly inappropriate.

3. that title 18 U.S.C. 1153 should be amended to insert the following language at the end of the existing statute: "Notwithstanding the

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[43] Hearings before the Subcommittee on Indian Affairs on S. 2010, part 2, May 4–5, 1976.

exercise of jurisdiction over any of the above named offenses by the Federal Government, any Indian tribe shall be recognized to possess concurrent jurisdiction insofar as any similar offense may have been defined under tribal law. In the event of an assertion of criminal jurisdiction by any Indian tribe over any felony-grade offense as defined under Federal law, any defedant shall have an automatic right of appeal to the appropriate Federal district court."

4. that 18 U.S.C. 1161 and 28 U.S.C. 1361 (Public Law 83-280) be amended to give Indian tribes retrocession authority as proposed in Senate bill S. 2010, 94th Congress, 1st Session, June 25, 1975.

5. that 28 U.S.C. 1738 be amended to insert the following language after the word "Territorial", in the title of the statute: "and Tribal"; after the word "Territory", in the first paragraph: "Indian Tribe"; after the word "Territory" in the last line of first paragraph: "Indian Tribe"; after the word "Territory", in paragraph two: "Indian Tribe"; after the word "Territory", in paragraph three: "Indian Tribe".

The purpose of this amendment is to place Indian tribes on the same footing as states and territories with respect to the applications of full faith and credit principles, thereby eliminating the serious injustices and jurisdictional dilemmas discussed in chapter II of the Task Force Report and Appendiced Studies.

CHAPTER III

FEDERAL RESPONSIBILITY TO PROVIDE SUPPORT FOR THE FUNCTIONS OF TRIBAL GOVERNMENT

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Chapter III

FEDERAL RESPONSIBILITY TO PROVIDE SUPPORT FOR THE FUNCTIONS OF TRIBAL GOVERNMENT

In the course of the Tribal Government Task Force's year-long investigative effort, approximately 63 days were spent in the field visiting twenty-one[1] different reservations; over thirty tribes[2] responded to a comprehensive forty-one page survey of Tribal Government; and over 70 tribes[3] presented testimony on Tribal Government issues in hearings and roundtables held throughout Indian country.

One of the overriding issues which surfaced and resurfaced throughout the year-long study was the critical lack of financial resources needed to adequately support the basic activities of the tribal government. It is undoubtedly no surprise to the Commission or Congress that adequate financing is a major concern to Indian tribes, but our primary focus is not so much on the adequacy of general Bureau programs, but rather on the ability of tribes to finance their tribal government either through independent tribal revenue or Federal programs.

Specifically, the task force has been concerned with the ability of tribal governments to finance:

1. a full-time salaried tribal chairman;
2. an adequately compensated tribal council;
3. a tribal attorney;
4. a tribal administrator; and
5. needed technical assistance.

These positions or functions have been identified by many tribes as critical to the successful exercise of tribal sovereignty. They are considered to be the "fundamentals" of Tribal Government and without the presence or availability of these positions or functions, the full exercise of tribal sovereignty, self-government and self-determination will never be realized. Clearly, a Federal recognition and reaffirmation of the inherent right of tribal self-government is a crucial first step in strengthening tribal governments, but without the ability of tribal governments to adequately finance these elementary functions, concepts of self-government and self-determination will have little meaning or impact.

This chapter will address the availability of tribal income to finance the "fundamentals" of Tribal Government; the inherent problems which result from insufficient finances; and the Federal response to this critical problem. Specifically, the ability of the self-determination G[illegible]ram to remedy the lack of tribal income to finance tribal [illegible]vernm[illegible]ill be discussed.

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[1] Ap[illegible]dix XVIII; Ta[illegible]orce Field Consultant Reports.

[2] Ap[illegible]dix XIX; Trib[illegible]vernment Surveys.

[3] T[illegible]Task Force pa[illegible]ated in hearings held in: San Marcos, California; Aberdeen, South[illegible]kota; Missoul[illegible]ntana; Oklahoma City and Muskogee, Oklahoma; and Phoenix, Arizo[illegible]

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Financing Tribal Government

In 1972, the General Accounting Office (GAO) attempted to measure the degree of dependency of the White Mountain Apache Tribe on Federal funds.[4] They discovered that Federal funds accounted for 81 percent of all reservation expenditures; state and local funds, 12 percent; and tribal funds, 7 percent. Approximately 19.4 million dollars were spent by the Federal, state and Tribal Governments on primarily service-oriented programs such as: education, health, housing, social and community services, business development, and employment placement and training. No Federal or state funds were made available to finance the fundamental functions of government outlined above. Independent task force investigations indicate that tribal income finances the tribal chairman, council and tribal attorney. Approximately one-half of the law and order budget was financed with tribal funds. Unfortunately, task force research indicates that a great number of tribes cannot finance their own tribal government operations.

The Task Force on Economic Development made an attempt to assess the potential for financial independence among thirty-two[5] reservations by comparing Tribal Government expenditures for 1975 with tribal disposal income from all tribal resources for 1975.[6] They found that 37.5 percent of the surveyed tribes were unable to pay their normal government operating expenses. Necessarily, they were dependent on the Federal Government to provide funds for development and for services. Of these governments, four have physical resource bases so inadequate that without Federal assistance it is difficult to imagine them ever being able to finance their tribal governments. Of the thirty-two tribes, 28.1 percent barely had sufficient tribal income to cover their annual administrative expenditures.

The results of the Tribal Government Task Force survey were even grimmer.

Tribal Chairman

In a survey of fifty-two (52) tribes[7] (excluding Alaska) one-half of the tribes surveyed indicated their tribal chairman was not salaried. Those same tribes indicated their chairmen could only devote part-time attention to his or her Tribal Government because of a lack of tribal income to support a full-time chairman. For many tribes, if tribal income is insufficient or unavailable to salary a tribal chairman, the tribe is often unable to salary any other position within the tribal government. Thus, many tribes have no full-time salaried employees and the burden of operating a government rests squarely on the shoulders of an unpaid, part-time tribal chairman.

Although most unsalaried chairmen indicated that they could only devote a limited amount of time to tribal government affairs, it was not uncommon for a chairman to spend every available free moment on tribal business. A typical situation was described by a chairman of a Mission Band in Southern California:

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[4] Comptroller General of the United States. "Better Overall Planning Needed to Improve the Standard of Living of White Mountain Apaches of Arizona." General Accounting Office, August 12, 1975.

[5] The tribes were randomly selected and range in population from 84 to 8,410.

[6] Tribal government expenditures were not always met from tribal income. In many instances, tribal expenses were met by federal program funds such as the Tribal Government Development Fund (TGDF), CETA or General Revenue Sharing.

[7] Data for the survey was collected from field report interviews, questionnaires and testimony taken from hearings and roundtables.

> It is practically full time right now. Well, I get off about five o'clock in the evening every night. Four or five nights a week we have meetings on different types of business programs. And, sometimes, Saturday and Sunday.[8]

An unsalaried Western Oklahoma chairman indicated that he had people who spent 25–30 hours a week working for the tribal government without any compensation.[9]

The importance of a full-time tribal chairman cannot be overemphasized. Even where funds are available to hire an administrator, situations arise which require the immediate attention of the elected tribal leader. Communications and negotiations with the BIA, jurisdictional confrontations with state and local governments—all require the attention of someone in a leadership position. In fact, 71.4 percent of those tribes whose chairman was part-time indicated that having a part-time chairman adversely affected the operations of their Tribal Government. The absence of a full-time chairman clearly hinders the efficient operations of government just as a part-time governor or mayor would limit the effectiveness of a state or city government. In fact, for tribal governments, the negative effect is even greater because of the general absence of any other salaried tribal employees. Further, Tribal Governments generally operate in a "crisis-like" atmosphere. Federal program applications often reach tribal offices only days before the deadlines for submission. All other normal governmental activities must cease and proposal packages prepared. If a resolution from the tribal council is needed, a special council meeting must be called. The construction of a reservation home may have just been "redtagged" for violation of a local zoning ordinance or a confrontation with state or county law enforcement officers over the arrest of a non-Indian on reservation lands. These kinds of "crisis" situations require immediate responses. Without a full-time tribal leader who is able to react, a beneficial federal program may be lost. More importantly, federally recognized powers of self-government become meaningless in the absence of a government to exercise such powers.

Tribal council

Task force research indicated that an even greater number of tribes were unable to salary their tribal council than those who were able to salary their tribal chairman. Three-fourths of the tribes were unable to salary full-time tribal councils. Over 35 percent of the tribal councils received no compensation of any kind.

The inability to adequately finance council members was considered by many tribes to be a major stumbling block in the efficient operation of Tribal Governments.[10] A Northern Montana tribe complained of the inability to complete the revision of a very outdated law and order code simply because council members were unable to devote more than a few hours a month to council business.[11]

The Sisseton-Wahpeton Sioux Tribe of South Dakota felt that many policy decisions appropriately belonging within the authority and responsibility of the council were being made by the administrative staff, because the council was not available a sufficient amount of the time.[12] Even tribes who were able to compensate their council members complained that compensation was so inadequate that the tribal government experienced difficulty in attracting interested and capable individuals to work in the tribal government.

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[8] See, Southern California Transcript, Vol. I, p. 61.

[9] Appendix XVIII; Cheyenne-Arapaho Field Report.

[10] Appendix I; Chapter III, pp. 26–29.

[11] Appendix XVIII; Rocky Boy's Field Report.

Like any government, the absence of a fully-participating council to act as a check on the activities of the executive, creates at least the potential for abuse of authority. The power vacuum created by an inactive council forces the executive or tribal chairman to assume the responsiblities and authority of the council without a delegation of authority. Practically, the absence of a tribal council may slow down the tribal government machinery, or even worse, halt it altogether.

Tribal attorney

As important as the tribal chairman and council are to the effective operations of tribal government, so too is the availability of a tribal attorney. Tribes are engulfed in a maze of Federal treaties, statutes, and regulations. Many are engaged in litigation with the states and Federal government over tribal sovereignty, jurisdiction, water rights, etc.[13] Without the availability of legal counsel not only is the effectiveness of tribal government hampered, but the potential for narrowing or usurping of tribal rights of self-government.

The need for full-time legal counsel was considered by many tribes to be of critical importance. Over 40 percent of the surveyed tribes have no full-time counsel. Even tribes who retain full-time counsel complained that it was often not sufficient to meet their day-to-day legal needs. Though they may have sufficient income to employ an attorney, tribes felt income was often inadequate to afford badly needed technical legal kinds of assistance such as that needed in the drafting of tribal ordinances. Legal advice is not readily available to many tribal governments.

The Uintah and Ouray Tribe of Utah indicated that even though they employed legal counsel, the high cost of litigation prevented them from engaging in litigation over a number of issues involving their tribal sovereignty. The tribe applied for a state liquor license in order to improve the operations of a tribal resort rather than risk a state-initiated lawsuit over the tribe's exemption from state liquor licensing requirements.[14]

This scenario was found throughout Indian country.[15] Tribes complained bitterly that the Federal Government often sits silently while the tribe is left to fight its own legal battles. The Department of Revenue of the State of Montana has taken the legal position that a tribe is a "local association" which only has those powers expressly granted to it pursuant to Federal treaties or legislation. The chief tax counsel rejected any notion that Indian tribes possess any inherent rights or powers of self-government.[16] Consequently, the State of Montana is engaged in litigation with Indian tribes or their members over the application of the following kinds of state taxes: personal income and property tax; oil and gas net producers tax; oil producer's license tax; natural gas extraction tax; and inheritance tax.

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[12] Appendix XVIII: Sisseton-Wahpeton Field Report.

[13] Appendix I: Chapter II, p. 34.

[14] Appendix XVIII: Uintah and Ouray Field Report.

[15] Note 13, Supra.

[16] See, Missoula Transcript, pp. 12 and 13.

The Department of Revenue indicated that Montana had recently adopted a gross proceeds statute for the taxation of coal whereby the contract sales price determines the tax on the coal. Much of Montana's coal lies within the exterior boundaries of reservations in Southeastern Montana, specifically the Crow and Northern Cheyenne Reservations. The state tax counsel stated that if at some future time a coal producer was extracting coal within reservation boundaries, the state would undoubtedly attempt to apply its coal tax over the production of that operation.

The financial burden which accompanies litigation of this kind is considerable. The Aqua Caliente Band of Mission Indians estimated that they have spent over $250,000 in legal fees litigating with the City of Palm Springs over their exclusive right to zone tribal lands.[17] It is an incredible drain on already limited amounts of available tribal income. The effect of protracted litigation is the diversion of tribal income away from other critically needed tribal governmental functions. If the trustee will not actively protect tribal resources and sovereignty, then at a minimum, Federal funds should be made available so that tribes are capable of engaging their own legal counsel and protecting their own sovereignty.

Other critical needs

Task force research further pointed out not only a pressing need for full-time tribal administrators,[18] but for training and technical assistance. Priority areas for training included: accounting, financial management, general administration, law enforcement, resource development, and business management.[19]

Over 75 percent of the tribes have no on-going program to train newly elected tribal officials in the operations of tribal government.[20] Without a system for institutionalizing and teaching the information out-going elected officials have absorbed during their tenure in office, stable, smoothly operating tribal governments are extremely difficult to maintain.

Adequate financing of Tribal Governments is as critical an issue for tribes as the reaffirmation by Congress of their inherent rights of self-government. Until the passage of the Indian Self-Determination Act, there have been very few available Federal programs designed to strengthen Tribal Governments.[21] Though it is too soon to adequately evaluate the act in its entirety, it is possible to analyze its potential for remedying the financial needs of tribal governments.

Indian Self-Determination Act

On January 4, 1975, the 93rd Congress passed Public Law 93–638, the Indian Self-Determination and Educational Assistance Act. It was the combination of almost 10 years of effort to set a new direction for Federal-Indian policy. This new direction provides for full participation of Indian tribes in programs and services conducted by the Federal Government without in any way altering the special trust responsibility owed Indian tribes.

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[17] See, Southern California Transcript; Vol. II, p. 54.

[18] Appendix I; Chapter III, p. 29.

[19] Appendix I; Chapter III, pp. 30–36.

[20] Appendix I; Chapter III, pp. 28, 34–35.

[21] The Tribal Government Development Program was replaced by Section 104 of the Indian Self-Determination Act (P.L. 93–638).

There are four primary sections of title I of the Self-Determination Act. The first is contracting and directs the Secretary of the Interior to enter into contracts with tribal organizations for the planning, conduct or administration of programs the Secretary is authorized to administer for the benefit of Indian people.[22] The second is referred to as "capacity building" and authorizes the BIA to award grants to tribal governments for the strengthening of tribal governments, among other purposes.[23] The third allows tribes to plan or design any Bureau program, excluding any trust resource programs.[24] Finally, the act makes available three personnel tools that permit tribes and tribal organizations to acquire the services of Federal employees. These tools are: (1) the direct hiring of present employees of the Bureau of Indian Affairs.[25] (25 U.S.C. 48, which permits tribes to direct activities of Bureau employees; and (3) the Intergovernmental Personnel Act,[26] which allows tribes to secure the temporary services of Federal employees to assist the tribe.

The focus of the Tribal Government task force is on section 104(a) of the Act, the Self-Determination Grants Program. The importance of this program is that it is directed at the strengthening and improvement of tribal government. It replaces the Tribal Government Development Program (TGDP) and is in effect the only significant Federal program which provides grants to tribal governments and for tribal governmental purposes.

Section 104(a) provides that self-determination grants may be made for the following purposes: (1) Strengthening and improving tribal governments; (2) planning, training, evaluation or other activities designed to improve the capacity of Indian tribes to contract; (3) acquisition of land in connection with contracting or strengthening acquisition of land; and (4) planning, designing and evaluating Federal programs which serve Indian tribes.

Strengthening Tribal Governments

The broadest purpose for which self-determination grants may be awarded is the strengthening or improvement of Tribal Government. As outlined in the Bureau's procedural guidelines for self-determination grants program,[27] the basic criteria for Bureau approval of the grant application is that the application demonstrate "a direct and reasonable relationship between the applicant's proposal and purposes of the Self-Determination Grants Program as set out in the act and regulations." Part 272 of the Self-Determination Regulations lists six examples of strengthening and improving tribal government. They are: (1) Developing the capacity of the executive, legislative and judicial branches of Tribal Government in areas such as administration of planning, financial management or merit personnel systems; (2) improvement of tribally-funded programs or activities; (3) development, construction, improvement, maintenance, preservation or operations of tribal facilities or resources; (4) training of tribal officials and employees in areas relating to the planning, conducting, administration of tribal programs; (5) designing and implementation of new Tribal Government operations; and (6) development of policy making, legislative and judicial skills.

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[22] Sections 102(a) and 103(a) of P.L. 638; 25 CFR 271.12.
[23] Section 104(a)(c); 25 CFR 272.
[24] 25 CFR 272.27.
[25] 25 CFR 275.3(a)(2).
[26] Section 105(b) of P.L. 638; 84 Stat. 1909.
[27] Exhibit 7.

It is the responsibility of the tribal governing body to establish that such a grant will improve the tribe's governing capabilities. From this reading, it would appear that if the tribe did not have a salaried chairman or did not employ legal counsel that such positions could be financed through the grant program since the presence of a full-time chairman or legal counsel clearly has the potential for "improving the tribe's governing capacity" which in turn has the effect of strengthening that Tribal Government.

Though such a reading appears reasonable, the procedural guidelines narrow the broad purposes of the Self-Determination Grant Program. Part 2, entitled Standards for Selecting Items of Cost, lists allowable costs, costs allowable with the approval of the Bureau, and unallowable costs. Salaries and expenses of tribal government officers are considered to be a cost of "general" tribal government and are unallowable unless they are a direct result of the tribal officers' services to the grant program.[28] In other words, if a tribe submits a grant application to revise the tribal constitution and bylaws to define more precisely the powers and responsibilities of its tribal officials and branches of tribal government, the tribal chairman could only be compensated for services related to revising the constitution and bylaws. Even this cost would only be allowable subject to advance agreement and approval of the Bureau.

For the same grant proposal to revise the tribal constitution and bylaws, services of an attorney to draft new provisions or advise the tribe of possible amendments would be allowable. Yet, the self-determination grant could not be used to employ legal counsel to represent the tribe on all legal issues affecting the tribal government. Specifically prohibited are legal expenses for the prosecution of claims against the Federal Government.[29]

The procedural guidelines make the distinction between a "specific" program for improving the tribe's governing capacity and "general" costs of tribal government. A fallacy of this distinction is that many tribes simply cannot finance general costs of tribal government. If all tribes had sufficient tribal income to at least be able to adequately salary their chairman, council and tribal attorney, then the restrictions on compensating tribal officers and employing legal counsel are more understandable. But many tribes do not have salaried chairmen or employ legal counsel. Even tribes who indicated they salary their chairman or counsel complained that it was insufficient to allow for maximum participation in Tribal Government affairs.

One example of the kind of project which is consistent with the act and its regulations is the improvement of the tribal judicial branch so that it is able to exercise the full range of judicial powers. Clearly, there are a number of ways in which a grant application such as this could be used. Training of tribal court judges on rules of evidence, case law and procedural motions would be appropriate, or the purchasing or books necessary for a tribal law library. But could the self-determination grant be used to salary the tribal judge? The ability of a tribe to adequately compensate its tribal judges is undoubtedly crucial to improving and upgrading the tribal court, yet under the grant guidelines, the compensation of a tribal judge appears unallowable or at best, unclear. Certainly, training of tribal judges is badly needed and desired by many tribes, but if the salary of a tribal judge is inadequate, how do tribes attract and retain willing and qualified candidates? Again, for tribes who have sufficient tribal income to salary these basic and key tribal positions, the limitations or restrictions on costs are reasonable. But for the many tribes who are not able to develop their income capabilities or who simply have no potential income, the limitations are burdensome and oppressive. There are simply not many Federal programs available to tribes which are flexible enough to allow them to finance basic tribal government positions.

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[28] Note 27, Supra.
[29] Note 27, Supra.

Public Law 93-638

On June 16, 1976, the Commissioner of Indian Affairs notified all area directors that Congress had approved and the President had signed the fiscal year 1976 Self-Determination Grant Supplement in the amount of $7,250,000.[30] In determining the field allocations to tribes under the Self-Determination Grant Program, the majority of the appropriated funds are to be distributed on the basis of formula which utilizes a declining per capita share based on the population of each eligible tribe. In a memorandum to all area directors, the Commissioner of Indian Affairs explained the formula as follows:

Population:	*Cost factor*
1st 2,000	$50
Next 2,000	40
Next 2,000	30
Next 2,000	30
Next 2,000	20
Next 2,000	10
All over 10,000	3

The population figures used to calculate fund distribution by formula must be in accordance with Exhibit 1 OMB Circular A-46 revised. The Office of Management and Budget (OMB) issued Exhibit 1 as an amendment to Circular A-46 on June 6, 1975 "to assure use of standard data on total population for all Federal programs which make use of total population data in the distribution of Federal benefits." The circular specifies that the most current Census Bureau estimates are to be used. Any exception must be justified to OMB and approved by them. Thus, because there are no current census figures for Indian population beyond 1970 any exceptions must be approved by OMB.

The definition of population required by OMB is as follows: (1) for tribes eligible for general revenue sharing the latest revenue sharing population figures; (2) for tribes not eligible for general revenue sharing an equivalent population is used; and (3) for Oklahoma, the census figure for Indians belonging to that particular tribe in the former reservation area if larger than the revenue sharing population. The population figures for revenue sharing fund distribution are based on the number of persons under the jurisdiction of the government and receiving substantial governmental services.[31] For Indian tribes, the figures are U.S. Census estimates of (1) all resident Indians within the reservation boundaries whether living on trust land or not; and (2) Indians residing on trust land pertaining to the tribe and adjacent to the reservation. Trust land is defined as tribal, individual or public domain trust land which is held for members of that tribe.

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[30] Exhibit 8; Commissioner's Memorandum of June 16, 1976.

Serious objections to this criteria have been raised by the tribes because of the discrepancy between their eligible population under Public Law 638 and the service population recognized by other Bureau programs. One rationale given by OMB for including only Indians residing on trust land adjacent to the reservation was some governmental unit, other than the tribe, would be providing governmental services to Indians residing on non-trust lands outside the exterior boundaries of the reservation. This is clearly an erroneous assumption on the part of OMB. Many Indians reside off the reservation but retain their traditional ties. With the shortage of adequate housing and the high rate of unemployment found on reservations, Indians must seek housing and employment opportunities elsewhere. Yet, many are still eligible for and receive services from the tribe. If one of the major purposes of the Self-Determination Grant Program is to increase tribal ability to contract programs and if off-reservation Indian members are eligible to receive the benefits of those programs, then it is only fair and equitable to include those persons in determining allocation of Public Law 638 grants.[32] Though there is an appeals process which allows the tribe to contest the assigned population figure, no objection can be based on the definitions and criteria outlined by the Office of General Revenue Sharing. The inequity of the population criteria is further exemplified by examining the computed "638" population figure.[33]

Commissioner Thompson, in a memorandum to all area directors, recognized the tribal concern over the criteria used for determining the population figures.[34] Without specifying a plan, the Commissioner expressed his confidence that the fiscal year 1977 allocations would be made in a way as to provide assistance to tribes which find themselves underfunded in relation to their service population.

Twenty-six tribes [35] are listed as having zero population figures—therefore, they will receive no money under the formula distribution system. For some of these tribes, it is understandable. Captain Grande, for example, is a former reservation of a Digueno Mission Band. The band eventually split up and two new reservations were established, Barona and Viejas (Baron Long). Both reservations own the Captain Grande Reservation although no one presently resides there, and there is no tribal government.

A number of those excluded tribes, such as the Orleans Karok and Saulte St. Marie Chippewa, either have no land base or no one resides within the boundaries of the reservation. Because the population criteria used requires a reservation population, these tribes will not receive self-determination grant money, although they are eligible to contract under sections 102 and 103 of the act. There is no rationale for excluding tribes who have no reservation or no reservation population. Oklahoma tribes are included within the grant program although they have little or no land base. There is a presumption that Oklahoma tribes perform Tribal Governental functions and provide services to their members. The same presumption should be extended to any and all tribes who have a service population whether or not they have a land base or reservation population.

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[31] Exhibit 9; Bureau of Indian Affairs criteria for performance of substantial governmental functions.

[32] See, Exhibit 9; for examples of discrepancy between tribal service population figures and population figure determined for grant programs.

[33] Exhibit 10; "638" Grant Formula Distribution for FY 1976.

[34] Note 30, Supra.

[35] See, Exhibit 11; for a list of the excluded tribes.

Contracting—tribal perspective

As mentioned in the beginning of this chapter, no attempt will be made to analyze contracting under the Self-Determination Act because it is such a new program. But, during our hearings, roundtable discussions, and field visits to reservations throughout Indian country, a number of fears and concerns were raised by tribal leaders over contracting. Some of these fears and concerns must be addressed before tribes take full advantage of the provisions of the Act.

A great number of tribes have indicated their fear that the Self-Determination Act is nothing more than a termination piece of legislation. Part of this fear, no doubt, stems from vivid memories of the Indian policy of the 1950's. Many tribes are simply fearful that termination may one day again become the policy of the Federal Government. Although section 3(b) of the Declaration of Policy reaffirms Congress' commitment to the unique relationship with and responsibility to Indian people, tribes are either not aware of that congressional declaration or simply remain skeptical. The Bureau has been of little assistance in trying to clarify any of these tribal fears. Throughout our investigative work, tribes have complained that they do not understand the act and that Bureau employees either have not explained it or do not understand the act themselves. As a result, a number of tribes are afraid to contract for fear that once they do, the local agency will dwindle in size or completely disappear. Further, tribes are concerned that the Bureau will not be strong advocates for Indian budget requests because Bureau employees, who may be replaced by tribal employees, will no longer have a vested interest in seeking those funds. Thus, funding for contracted programs will dry up. The Creek Tribe, concerned about protecting themselves against termination, indicated plans to only "selectively" contract Bureau programs to avoid having the local agency disappear.[36]

Maintenance of effort

Directly related to a fear of termination is a tribal concern that once a program is contracted there are no assurances that funding will be maintained at the same or a higher level the following year.

Contracting is not a new concept. A number of tribes have been contracting Bureau programs for several years. Some tribes that have experienced contracting complained of diminishing Bureau funding, requiring increasing amounts of tribal income to supplement the program in order to maintain a constant level of services to tribal members.

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[36] Appendix XVIII; Creek Field Report.

The Mojave Apache Community on the Fort McDowell Reservation recently turned back to the Bureau its law and order program after having contracted it for over four years. Their funding level increased only slightly over that four-year period, and the tribe simply did not have enough money to maintain their vehicles or recruit qualified officers. After turning the program back to the BIA, last July the funding increased 50 percent, from $22,000 to approximately $44,000.[37] Fort McDowell is now contemplating re-contracting the program with the hope that it will be funded at its present level.

If the Self-Determination Act is going to be successfully implemented, tribes need a guarantee of a maintenance of effort on the part of the Bureau. If situations like Fort McDowell persist, the Congress can be assured the Self-Determination Act will not be widely utilized by the Indian community.

BIA support of Tribal Government

Just as inadequate funding of programs can undermine well-intended acts of Congress, so can the individuals called upon to implement those acts. Testimony received over this past year indicates that a great many tribes are dissatisfied with the kinds of support they have received from the Bureau, whether at the agency, area or central office level.[38] Part of the dissatisfaction stems from the attitude of some, clearly not all, Bureau employees who use their positions and authority as a threat against tribal actions they do not approve of. The ability of a superintendent to disapprove a tribal resolution ordinance can seriously disrupt the functioning of Tribal Government.

Although there has been a Tribal Operations Division (now Tribal Government Division) within the BIA since at least the passage of the Indian Reorganization Act in 1934, there has never been an effort by that office to provide the kinds of Tribal Government assistance so badly needed and requested by tribes.[39]

Tribal operations appears to be limited to maintaining up-to-date constitutions and bylaws and tribal enrollment. What tribal governments are in need of is assistance in the drafting of law and order codes, zoning ordinances, implied current statutes. This kind of assistance is simply not readily available through any divisions within the BIA. The Bureau needs to re-adjust its objectives to be able to respond to the Tribal Governments of 1976.

Recommendations

1. A large number of tribes do not have sufficient tribal income to support the most basic functions of Tribal Government. At minimum, tribal governments must have the ability to salary a full-time chairman, adequately compensate tribal council members, and employ legal counsel. There are presently no adequate Federal programs which allow tribes to support these basic functions and positions of government. The Self-Determination Grants Program has the potential to remedy the problem of poorly financed tribal governments. Salarying of a tribal chairman, tribal council, tribal attorney, or any other tribal

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[37] See, Southwest Transcript; Vol. II, p. 217.
[38] Appendix I; Chapters I and III (generally).
[39] Appendix XVI; Bureau of Indian Affairs Support for the Functions of Tribal Government—Case Study of the Pine Ridge Reservation.

official should be considered a legitimate "capacity building" purpose of the Self-Determination Grants Program.

2. If a population formula is to be used for the distribution of Federal funds, a tribe's service population should include those members who reside off the reservation whether or not on fee or trust land, if they are otherwise eligible to receive the benefits or services of tribally administered programs. The criteria the Office of General Revenue Sharing utilizes to determine Indian population estimates, should be amended to include tribal members residing on or near the reservation whether or not on trust land and otherwise eligible for tribally administered programs.

3. Tribes who have functioning Tribal Governments, although they have no reservation residents, should be eligible to receive a self-determination grant.

CHAPTER IV

STATUS OF TRIBAL GOVERNMENT AND FEDERAL DOMESTIC ASSISTANCE PROGRAMS

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STATUS OF TRIBAL GOVERNMENT AND FEDERAL DOMESTIC ASSISTANCE PROGRAMS

In 1976, the Federal Government will expend 59.7 billion dollars in Federal grants to state and local governments for Federal domestic assistance programs, or 22 percent of budget outlays for domestic civil purposes.[1]

In the Summary Findings of A Study of Federal Indian Domestic Assistance Programs conducted by the National Council on Indian Opportunity, Office of the Vice President, it is stated:

"There are basic misunderstandings, inaccurate information, and lack of awareness and knowledge on the political status of federally recognized Indian tribes in respect to U.S. Federal Government-Tribe treaty relationship, tribal status as units of government, and tribal status in respect to an OMB (Office of Management and Budget) exclusion from A–95 requirements for state clearances on Federal grants, all of which prejudice and constrain federally recognized tribes in competing for Federal assistance program dollars."[2]

In this chapter of the report, the Tribal Government Task Force has analyzed the status of tribal governments in the massive delivery system of Federal domestic assistance programs. In our analysis, we draw from several studies of the Federal domestic assistance delivery system, testimony given in Congressional hearings, and surveys of 64 federally-recognized tribal governments now receiving services from at least one Federal program.

Our findings consistently show that in the delivery of Federal domestic assistance programs, tribal governments are not treated as governments for the direct access to Federal programs comparable to state and local units of government.

Because tribal governments are governments, the Task Force calls for the recognition in Federal policy of tribal governments as equivalent to state governments for purposes of direct access to Federal domestic assistance programs. Any statute less than this simply cannot be reconciled with the basic Federal-Tribal relationship, and would be tantamount to a repudiation of tribes as governments.

A. RELATIONSHIP OF TRIBAL GOVERNMENTS TO FEDERAL AGENCIES

The relationship of tribal governments to the 55 agencies of the Federal Government begins with the yearly receipt of the Catalog of Federal Domestic Assistance Programs from the Executive Office of the

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[1] Federal Aid to State and Local Governments, Special Analysis, Office of Management and Budget, and Federal Domestic Assistance Catalog.

[2] A Study of Federal Indian Domestic Assistance Programs; National Council on Indian Opportunity, Office of the Vice President; February, 1974; Summary Findings.

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President, Office of Management and Budget. States and other units of local government receive this catalog too, however, for these governments, there are special, well-staffed offices designated to go through the catalog's 1,000 plus pages (1975 catalog) and whose responsibility it is to determine which of the some 1,030 Federal programs are applicable and for which that government is eligible.

A recent Government Accounting Office report stated:

> **The Federal government has no single source of reliable and complete information on the type and availability of Federal assistance programs for state and local governments. Because of the proliferation of such programs, state and local governments have devoted considerable time and effort to identifying, keeping informed of, and availing themselves of Federal assistance. Despite these efforts, many state and local officials do not learn of available Federal assistance or learn of it too late to apply.**

The Government Accounting Office report goes on to say that to keep abreast of changes in the Federal programs, many cities and states maintain representatives in Washington to rely on private consultants, often at a considerable expense; and there is still no assurance that all sources have been explored.

The process for Tribal Governments is a much simpler one. To begin with, a recent study has shown that Indian tribal governments or tribally-chartered organizations are eligible for direct services from only 389 of the 598 programs analyzed.[3] The study was undertaken to identify tribal government eligibility for Federal programs because the catalog frequently fails to specify whether the eligible populations of governments, organizations, or individuals includes tribal governments or tribally-chartered organizations. Oftentimes, a tribe may not learn that it is ineligible for a particular Federal program until after the long, time-consuming and complex process of grant application has been completed and the materials have been forwarded to the agency concerned. Only in the rejection process, does the tribe become aware that services provided by the program applied for, are not directly available to Indian people.

The absence of a well-financed bureaucracy to deal with the complex Federal bureaucracy allows for a simpler process—the tribal government does not isolate those programs for which it is eligible and proceed with the grant application process, because the tribal government simply cannot know wherein lie the statutory barriers to tribal participation in Federal domestic assistance programs.

An earlier study, the Federal Indian Domestic Assistance Programs (FIDAP) Study, identified 78 Federal programs in which tribal governments were participating, out of 600 Federal programs studied. This finding pointed to the fact that the mere dissemination of the Catalog to all federally-recognized tribes was an insufficient effort to inform tribal governments of the Federal programs and services that were potentially available to them. Although the responsibility for informing tribes of the availability of Federal programs was traditionally that of the Bureau of Indian Affairs, the results of the FIDAP study showed this informational need was not being fulfilled.

These findings were confirmed by the feedback received from Indian tribes when a major effort was begun in 1972 to improve the delivery of services to state and local governments and to the general public, known as the President's Federal Assistance Review (FAR) program.

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[3] **Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, III, Executive Summary.**

In response to the problems which surfaced as a result of the FAR program, a study of delivery of Federal programs and services to all federally recognized tribal governments was undertaken by agreement of the Secretary of Interior and the Associate Director of the Office of Management and Budget. The study, Inter-agency Staff Study Report of Federal Field Organization for Indian Programs, was originally intended to be only a reconnaissance study, but as the study evolved, sufficient material was developed to support specific action recommendations.

Statement of the problem involved in the delivery of Federal programs to tribal governments and tribally-chartered organizations was detailed in the Summary of Findings of the Inter-agency Staff Study Report of Federal Field Organization for Indian Programs. It stated, "The Federal Government, viewed from an Indian tribe, can best be described as a maze of confusion, contradiction, inconsistency and fragmentation. The problems of state and local government, in relating to Federal programs, were the basis for the President's directives of March initiating the FAR program. These problems are multiplied for Indian tribes by the history of change in the Federal policies towards Indians, by special organizational arrangements for handling Indian programs, and by the lack of knowledge and understanding of Indian tribes on the part of Federal program officials. This has resulted in many Federal actions which are interpreted as deliberately detrimental to Indian progress. Progress in developing program improvements under the FAR program has produced actions that are frequently not applicable to Indians, apparently through oversight or lack of knowledge. Regional councils and their emerging coordination role were virtually unknown to Indian tribes, and Councils had shown little interest in Indian problems, in spite of the President's statement in his 1970 Indian Message that 'The First Americans—the Indians—are the most deprived and most isolated minority group in our Nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.' There is no organized, usable body of knowledge accessible to Indian tribes as to Federal programs that are available to them. When information is made available, they find that the instructions and guidelines were developed on a nationwide basis for use by state and local governments. Consequently, the tribes are frequently required to organize themselves differently, work through undesirable channels, and sometimes give up control of a tribal function in order to participate in specific programs. The net result today is that Indian tribes, when considering the changes underway or planned for the Federal systems under the FAR program in the light of their past experience, are forced to conclude that they have much to lose and little to gain." [4]

The relationship of Tribal Governments to the agencies of the Federal Government is characterized by a pervasive lack of awareness and understanding on the part of all parties concerned. The tribal government is uninformed of the Federal programs available to it, and ill-equipped financially and administratively to pursue Federal grants for domestic assistance on a competitive basis with state and local governments. The Federal agencies, in turn, have failed to acknowledge treaties, Federal policy, and court decisions which have clearly established the independent political status of tribal governments. Recognition of tribal governments as eligible for direct access to all relevant Federal domestic assistance programs is the only Federal policy logically consistent with the basic policy upon which the Federal-Indian relationship is based. The practice of Federal administrative agencies in either ignoring Indian tribes, or forcing them through state agencies for funding, is a classic example of what Kenneth Davis perceives as the worst abuse of Federal discretionary power—subverting the intent of Congress.[5]

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[4] Inter-Agency Staff Study Report Federal Field Organization for Indian Programs, pp. 4–6, Summary Findings.

B. ACCESSIBILITY TO FEDERAL PROGRAMS AND SERVICES

On June 30, 1976, Circular A–85 of the Office of Management and Budget was revised to provide tribal governments with the same opportunity to participate in the preparation of Federal regulations as is provided to state and local governments.

Circular A–85 provides:

> That the chief executives of State and local governments (and tribal governments) will be given a reasonable opportunity to comment on major proposed Federal rules, regulations, standards, procedures and guidelines (hereafter called regulations), major interagency agreements concerning program operations and major organizational changes, any of which have a significant and nationwide effect on State and local (and tribal) governments.

Hopefully, the revision of Circular A–85 will for the first time expand the participants involved in the decision-making level of the Federal domestic assistance delivery system to include tribal governments. Attempts to enhance the accessibility of tribal governments to any part of the Federal service delivery system in the past have been discouraging.

A workable approach to overcome the lack of awareness of available programs, and to improve the delivery of services to tribal governments and its success, is described below.

In the Summary of Recommendations of the 1972 Inter-agency Staff Study Report of Federal Field Organization for Indian Programs, the study staff recommended that "Regional Councils should give a high priority to Indian problems by developing their Indian Task Forces and encouraging interagency coordination at the program level."[6] The Indian Task Forces within each Regional Council were to be composed of representatives from each Federal agency delivering services to Indian tribes, with the designation of a lead agency to act as liaison with the tribal governments in that region. It was the responsibility of the Regional Council Indian Task Forces to coordinate with the Bureau of Indian Affairs in the effort to inform tribes of the Federal programs and services available to them, and to facilitate the delivery of services to tribal governments.

In an attempt to assure the realization of these goals set forth for the Regional Councils, a memorandum was issued by the Office of Management and Budget to the Regional Council Chairmen on March 15, 1972, concerning Indian reservation development. The memorandum informed the Regional Council Chairmen of a new thrust program announced by the Secretary of Interior and the Commissioner of Indian Affairs to be called the Reservation Acceleration Program (RAP). The memorandum suggested that the Federal Regional Councils provide "guidance and technical assistance to tribes on regulations, standards, criteria, or other requirements of the member agencies, and consider how existing and available funds within each program area can be better related to tribal priorities." [7]

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[5] "Discretionary Justice," Kenneth Davis, Louisiana State University Press.

[6] Inter-Agency Staff Study Report Federal Field Organizations for Indian Programs, p. 7, Summary of Recommendations.

The Reservation Acceleration Program was begun in January, 1972, and was to involve 12 tribes chosen from the 35 tribes participating in the Economic Development Administration's Selected Indian Reservation Program. Under RAP, a tribe would develop a comprehensive plan with an associated projected budget for the implementation of the plan. The plan would then be reviewed by the BIA Agency office, the BIA Area office, and again in Washington. At each of these levels, negotiations with the tribe would occur to determine the manner in which adjustments in the BIA budget at each level might better respond to tribal priorities outlined in the RAP plan.

Following this procedure, the tribe would submit its RAP plan to the Federal Regional Council where representatives from each agency would work with the tribe and the BIA Area Director acting as liaison, to assist tribes in the review of RAP plans, in developing applications for financial assistance from Federal agencies, and to continue to provide technical assistance to tribes and support in follow-up on pending assistance applications. The goals to be fulfilled by the Federal Regional Councils in their participation in the Reservation Acceleration Program were outlined in a memorandum of June, 1972, from the Office of Management and Budget to the Federal Regional Councils.

Goals

1. To render support to the Reservation Acceleration Program, specifically by providing counsel and suggestions on how the tribes might achieve RAP objectives.
2. To initiate procedures to enable the FRC (Federal Regional Council) to maintain contact with RAP reservations.
3. To assist the Department of Interior in monitoring the impact.[8]

The development of comprehensive tribal plans and the coordination with the Federal Regional Councils under the Intergovernmental Cooperation Act of 1968, enabled tribal governments to participate in and directly impact the improvement of delivery of Federal programs and services for the first time.

The Reservation Acceleration Program failed. The responsibility for the failure of what could have been a great step forward for tribal governments lay mainly with the inability of the Bureau of Indian Affairs to implement the program. An interview with an officer of the Intergovernmental Relations and Regional Operations Division of the Office of Management and Budget revealed the following causes of the Reservation Acceleration Program failure:

1. BIA mismanagement.—The Bureau of Indian Affairs announced the Reservation Acceleration Program without prior notification to the Regional Councils or the tribes selected for the pilot project. Procedures for implementation were not well thought-out prior to the notification to the tribes and Regional Councils.

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[7] Memorandum from Office of Manageemnt and Budget to Regional Council Chairmen; March 15, 1972; Frank C. Carlucci, Chairman, Under Secretaries Group for Regional Operations.

[8] Memorandum from Office of Management and Budget to Regional Councils; June 27, 1972; Suggested further guidance for FRC involvements in the RAP program.

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2. BIA budget.—It was determined that the Bureau could not shift between line items in the Bureau budget without the approval of the Secretary of Interior and the Office of Management and Budget. The BIA could not adjust its budget at the Agency, Area, and Federal levels specified in the negotiation process of the RAP plan to reflect tribally-established priorities. Negotiations thus failed in the initial stages, before the Federal agencies of the Regional Council ever got involved.

3. Reservation Acceleration Program was not well thought-out.—Federal grant programs had already been allocated for the upcoming fiscal year. Member agencies of the Federal Regional Councils could not offer any assurance to tribes that funds would be available in the following fiscal year as funds had not yet been appropriated.[9]

The concept embodied in the Reservation Acceleration Program, of allowing tribal governments to have direct, face-to-face access to the Federal agencies represented at the Regional Council, seemed to be an enlightened one. Indeed, in the survey of Tribal Governments and public hearings conducted by the Task Force, both tribes and agency representatives expressed a preference for this kind of direct interaction.[10] Clearly, when members of the tribal government and representatives of the Federal agencies sit down at the same table, cultrual differences and bureaucratic complexities can enter an arena which enhances mutual understanding and meaningful communication.

C. Barriers to Tribal Participation in Federal Programs

The most insurmountable barriers to tribal participation in Federal programs are statutory barriers. These barriers lie in the authorizing legislation of each Federal program and are the most difficult to amend for tribal government eligibility in the direct service population. A Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs has been recently released, a summary of which is illustrated in Figure One. Each table represents the status of tribal governments in relation to the programs offered under each agency and Department. Programs enumerated under Table 1, are those Federal programs in which state government, local government, another type of program applicant, or multi-tiered system receives funding from a Federal agency, and there is no apparent barrier in the statute which might prevent an Indian Tribal Government or tribally chartered organization from dealing directly with the Federal agency on the same basis. Table 2 represents those Federal programs in which Indian Tribal Governments or organizations are apparently eligible for assistance, but some form of state involvement is required by the statute in the form of governor's sign-off, compliance with a state plan or other arrangement. Table 3 indicates those Federal programs in which an Indian Tribal Government, tribally-chartered public or private organization appears to be ineligible under the terms of the statute. Examples of this include a requirement that an organization comply with state law, hold a state charter, or be an organ of state government. The numbers in parentheses after each agency indicate the number of Federal programs offered by each agency.[11]

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[9] Interview with Sydney Freeman, Intergovernmental Relations and Regional Operations Division, Office of Management and Budget, July 9, 1976.

[10] Appendix I; Chapter IV.

FIGURE 1

	Table 1	Table 2	Table 3	Eligible for—
U.S. Department of Agriculture:				
Agricultural Research Service (1)	(1)			1 out of 1.
Animal and Plant Health Inspection Service (3)	(1)		(1)	1 out of 3.
Agricultural Stabilization and Conservation Service (13)	(1)			1 out of 3.
Commodity Exchange Authority (1)				0 out of 1.
Agricultural Marketing Service (5)			(1)	0 out of 5.
Cooperative State Research Service (4)	1	1	2	2 out of 4.
Economic Research Service (1)				0 out of 1.
Farmer Cooperative Service (1)	1			1 out of 1.
Farmers Home Administration (21)	9	2	1	11 out of 21.
Federal Crop Insurance Corporation (1)				0 out of 1.
Extension Service (1)			1	Do.
Food and Nutrition Service (8)		7	1	7 out of 8.
Forest Service (10)	3		8	3 out of 10–11.
National Agricultural Library (1)				0 out of 1.
Office of Communication (1)				Do.
Packers and Stockyards Administration (1)				Do.
Rural Electrification Administration (3)			3	0 out of 3.
Soil Conservation Service (8)		1	2	1 out of 8.
Statistical Reporting Service (1)				0 out of 1.
Total	17	11	20	28 out of 85.
Department of Commerce:				
Bureau of Census (7)	4			4 out of 7.
Domestic and International Business Administration (6)	4			4 out of 6.
Economic Development Administration (10)	6	1	1	7 out of 10.
National Oceanic and Anmospheric Administration (15)	5	2	5	7 out of 15.
Maritime Administratiot (10)	2		1	2 out of 10.
National Bureau of Standards (6)	3		1	3 out of 6.
National Technical Information Service (1)	1			1 out of 1.
Office of Minority Business Enterprise (1)	1			Do.
Patent and Trademark Office (1)				0 out of 1.
U.S. Travel Service (1)	1			1 out of 1.
Total	27	3	8	27 out of 58.
Department of Defense:				
Defense Supply Agency (1)	1			1 out of 1.
Department of Army, Office of Chief of Engineers (11)	3		8	3 out of 11.
Defense Civil Preparedness Agency (16)	3	5	5	8 out of 16.
Department of Army, National Guard Bureau (1)			1	0 out of 1.
U.S. Soldiers' and Airmen's Home (1)				Do.
Office of Assistant Secretary (Installations and Logistics) (1)	1			Do.
Secretaries of Military Departments (1)	1			Do.
Total	9	5	14	14 out of 32.
Department of Health, Education and Welfare:				
Public Health Service (92)	74	8	10	82 out of 92.
Office of Education (105)	56	5	27	61 out of 105.
National Institute of Education (1)	1			1 out of 1.
Office of the Secretary (20)	7	9	5	16 out of 20.
Social & Rehabilitation Service (9)		1	7	1 out of 9.
Social Security Administration (8)				0 out of 8.
Public Health Service II (42)	42			42 out of 42.
Total	1800	23	49	203 out of 277.
Department of Housing and Urban Development:				
Federal Insurance Administration (4)			1	0 out of 4.
Housing Production and Mortgage Credit/FHA (46)	16	2	1	18 out of 46.
Community Planning and Development (7)	5	1	1	6 out of 7.
Office of Equal Opportunity in Housing (1)				0 out of 1.
Office of Policy Development & Research (10)	1			1 out of 1.
Housing Management (1)	1			Do.
Federal Disaster Assistance Administration (2)		1	1	1 out of 2.
Total	23	4	4	27 out of 62.

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[11] Study of Statutory Barriers to Tribal Participation in Federal Domestic Assistance Programs, American Indian Law Center for Native American Technical Assistance Corporation.

FIGURE 1—Continued

	Table 1	Table 2	Table 3	Eligible for—
Department of Interior:				
Bureau of Indian Affairs (34)				34 out of 34.
Bureau of Land Management (13)	8		3	8 out of 13.
Bureau of Mines (2)	2			2 out of 2.
Mining Enforcement and Safety Administration (3)	2		1	2 out of 3.
Bureau of Outdoor Recreation (2)		1		1 out of 2.
Bureau of Reclamation (4)			3	0 out of 4.
U.S. Fish and Wildlife Service (2)	7		3	7 out of 12.
Geological Survey (5)	1		3	1 out of 5.
Indian Arts and Crafts Board (1)				1 out of 1.
National Park Service (11)	6		2	6 out of 11.
Office of Water Research and Technology (4)	1		2	1 out of 4.
Total	29	1	17	30 out of 91.
Department of Justice:				
Drug Enforcement Administration (5)	4		1	4 out of 5.
Civil Rights Division (7)	1			1 out of 7.
Community Relations Service (1)	1			1 out of 1.
Federal Bureau of Investigation (6)	5			5 out of 6.
Irrigation and Naturalization Service (1)				0 out of 1.
Law Enforcement Assistance Administration	10	4	1	14 out of 15.
Bureau of Prisons (1)		1		1 out of 1.
Total	21	5	2	26 out of 35.
Department of Labor:				
Bureau of Labor Statistics (5)	5			5 out of 5.
Labor-Management Services Administration (4)	1		2	1 out of 4.
Manpower Administration (18)	13	1	3	13 out of 18.
Employment Standards Administration (8)			1	0 out of 8.
Bureau of International Labor Affairs (1)				0 out of 1.
Occupational Safety and Health Administration (1)	1			1 out of 1.
Total	20	1	6	21 out of 37.
Department of Transportation:				
United States Coast Guard (3)	1		1	1 out of 3.
Federal Aviation Administration (4)	3			3 out of 4.
Federal Highway Administration (2)			2	0 out of 2.
Federal Railroad Administration (4)	1		1	1 out of 4.
Urban Mass Transportation Administration (8)	3		5	3 out of 8.
Office of Pipeline Safety Operations (1)			1	0 out of 1.
Total	8	0	10	8 out of 23.
Small Business Administration (24)		24		24 out of 24.
Environmental Protection Agency:				
Office of Air and Waste Management (12)	9	1	3	10 out of 12.
Office of Water and Hazardous Materials (16)	12		2	12 out of 16.
Office of Research and Development (7)	7			7 out of 7.
Office of Planning and Management (2)	1		1	1 out of 2.
Office of Regional and Intergovernmental Operations (1)				0 out of 1.
Total	29	1	6	29 out of 38.
American Revolution Bicentennial Administration (3)	2		1	2 out of 3.
Regional Commissions:				
Appalachian Regional Commission (15)		9	6	9 out of 15.
Coastal Plains Regional Commission (3)		3		0 out of 3.
Four Corners Regional Commission (3)		3		3 out of 3.
New England Regional Commission (3)		3		Do.
Ozarks Regional Commission (3)		3		Do.
Upper Great Lakes Regional Commission (3)		3		Do.
Old West Regional Commission (2)		2		Do.
Pacific Northwest Regional Commission (2)		2		2 out of 2.
Total		28	6	28 out of 34.
Independent Agencies:				
ACTION (9)	7	2		9 out of 9.
Civil Service Commission (11)	7			7 out of 11.
Community Services Administration (7)		4	1	4 out of 7.
Energy Research and Development Administration (17)	9			9 out of 17.
Equal Employment Opportunity Commission (4)	3			3 out of 4.
General Services Administration (10)	8			8 out of 10.
Government Printing Office (2)			1	0 out of 2.
Interstate Commerce Commission (2)			1	Do.
National Credit Union Administration (1)	1			1 out of 1.
National Foundation on the Arts and Humanities (29):				
National Endowment for the Arts (12)	11		1	11 out of 12.
National Endowment for the Humanities (17)	13			13 out of 17.
National Science Foundation (13)	13			13 out of 13.
Nuclear Regulatory Commission (1)	1			1 out of 1.
President's Committee on Employment of Handicapped (1)			1	0 out of 1.
Veteran's Administration (22)	6		6	6 out of 22.
Water Resources Council (1)			1	1 out of 1.
Total	79	6	12	79 out of 128.

Thus, out of 598 Federal programs displayed in Figure 1, tribal governments are eligible for direct access to only 389 programs. Task force findings confirm these facts, though the tribes surveyed had to go through a much more laborious process to discern their inaccessibility to Federal domestic assistance programs. Overwhelmingly, tribes surveyed expressed the desire that these statutory barriers be removed and that Tribal Governments became eligible to be the prime sponsor for all Federal programs.[12]

The obstacles to tribal participation in Federal domestic assistance programs are not solely statutory barriers. Many tribes who are receiving Federal services have expressed difficulty in meeting the requirements of Federal programs which were designed for state and local governments.[13] Essentially, there has been only a minimal effort to scrutinize Federal programs for the flexibility of program standards to meet the needs of Tribal Governments. A tribe may be eligible to apply for Federal programs and receive monies, but the regulations which determine the manner in which the grant is to be administered, negate the utility of services to be received.[14]

1. GRANTS WITH COST-REIMBURSABLE OR MATCHING REQUIREMENTS

Originally designed for Federal grants to state governments, these stipulations require a tribe to provide the initial capital for a project to be undertaken, without regard to the well-documented and widely recognized lack of financial resources available to Indian tribes. Thus, in order for a tribe to receive monies once its grant application has been approved, the Tribal Government must secure a loan from a bank at the going, soaring, interest rates. State governments, with their substantial sources of revenue (state and local governments have allocated about 10 percent of their own resources to meet matching requirements for Federal grant monies)[15] experience little difficulty in complying with such regulations. But because most Indian land is held in trust by the Federal government, the tribe cannot even offer its property as collateral, and oftentimes, must secure the approval and support of the BIA in order to obtain a loan. This procedure necessitates the perpetuation of Bureau control over tribal actions and impinges upon the sovereignty of the Tribal Government, which once again finds itself beholden to the whim of the agency some have termed "Our Brother's Keeper".[16]

2. FORMULA GRANTS BASED ON POPULATION

It is a little known fact that 82.9 percent of the Indian tribes in the United States have populations of less than 1,000 members.[17] It is, however, a widely-known fact in Indian Country that population corresponds inversely to need. It is precisely these small tribes, which face imminent extinction, who suffer when allocations are determined on the basis of population. Given population bases which are so small that apportionment of funds becomes meaningless in responding to the need, Tribal Governments are thrust into the position of tapping every possible source of revenue to compensate for the meager sums and services offered by any one Federal program which allocates funds on a formula basis. The magnitude of this problem has been illustrated in countless examples,[18] but the most recent allocations based on population—monies to support and strengthen tribal governments under section 104 of the Indian Self-Determination and Educational Assistance Act—find the Flandreau Sioux Tribe of South Dakota receiving a total of $2000.00 for fiscal year 1977 to support its tribal government, while the Navajo Tribe, with the largest population base of any tribe, will be receiving $646,560.00 for the same fiscal year.[19]

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[12] Appendix I; Chapter IV.

[13] Appendix I; Chapter IV.

[14] Appendix I; Chapter IV.

[15] Senate bill S. 3281—Federal Program Information Act.

[16] "Our Brother's Keeper: The Indian in White America," Citizen's Advocate Center, 1969, New Community Press.

[17] BIA Tribes in Order by Population: 1973 Revenue Sharing; or Equivalent for Non-Revenue Sharing; or State Alternate for Oklahoma.

This problem is further compounded by the necessity that all Federal agencies comply with Office of Management and Budget Circular A–46, which requires that all Federal program funds allocated on a formula basis be based on 1970 census data.[20] Many tribes have voiced the complaint that 1970 census data was inaccurate in its initial count, with the inaccuracy greatly magnified in 1976. For the Oneida Tribe of Wisconsin, who sets its enrolled membership at 7,000 members while the Bureau figures designate 1,497 members for purposes of section 104 allocations, this will mean a difference of $185,150.00 in monies to be received by the Oneida Tribe for support of its tribal government.[21]

3. LACK OF UNIFORMITY IN FEDERAL PROGRAM FUNDING CYCLES AND SHORT-TERM APPROPRIATIONS

An integral factor in the effectiveness of any government depends on the ability of the government to develop short- and long-range plans for its resources. However, a great deal, if not all tribal government planning and resource allocation functions are dependent upon the actions of the Federal Government. Many of the tribes interviewed in the task force's year-long study of tribal governments were found to have few sources of tribal income.[22] Usually, there is not even enough money to salary a full-time tribal chairman, let alone the tribal council, or the much needed position of a tribal planner or administrator.[23] Occasionally, a tribe is able to obtain a grant from the Economic Development Administration to retain a tribal planner. Even then, it is often impossible for the tribe to acquire the funds necessary to develop their natural resources, where resources exist. Where there are funds and resources to be planned for, and the administrative and planning capability in place, reliance is still heavily upon Federal funds for the realization of any efforts toward development. This reliance makes tribal governments a great deal more vulnerable to the problems created by the lack of uniformity in funding cycles and short-term appropriations of which state and local governments complain so frequently.

Senator Jerome T. Hart of Michigan, in a statement issued in a Joint Hearing before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, described the problem for his State:

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[18] Appendix I; Chapter IV.
[19] BIA allocations for Fiscal Year 1977 under Section 104 of P.L. 93–638.
[20] Circular A–46 Revised, Office of Management and Budget.
[21] BIA allocations for Fiscal Year 1977 under Section 104 of P.L. 93–638.
[22] Appendix I; Chapter III.
[23] Appendix I; Chapter III.

> During our budget cycle we plan numerous programs on the assumption that federal funds will become available. Many times, however, we have taken action only with verbal assurance from a Federal agency that the funds will materialize. If for some reason the money is not available at the beginning of our fiscal year, we have the following alternatives: (1) continue the program and fund it with state monies and hope that the federal funds will materialize, (2) delay the implementation of the program, (3) cancel the program. Other problems stem from the fact that grants may begin or end at any point in a year. Many times we receive guarantees that the administration cannot fulfill or later rescinds. The delay of federal funds places us in the position of having one fiscal year for the grant program on a state basis, and then having a different fiscal period for the federal funds' portion of that same grant. When you come to the second year funding, it becomes very difficult to explain to the principals what the total program will be, how long it will run, and the amount of the state/federal match.[24]

This statement does indeed reflect an administrative nightmare, but the problem comes down to a much more basic level—sometimes a matter of survival—for Indian tribes. The lack of uniformity between agencies in funding cycles means that a tribe can secure HUD 701 monies to construct housing for tribal members, and then have to wait until the next funding cycle to obtain IHS services to provide water, plumbing and a sanitary disposal system for sewage.[25] Because of the critical shortage of housing on many reservations, tribal members have the choice of moving into a house with no water or plumbing, or remaining outside for the winter and risk freezing to death.[26] Certainly the inability to perform any comprehensive planning due to variations in funding cycles can, and in many cases does, have disastrous effects upon Indian people, and severely limits the services a tribal government can provide for its members.

Short-term appropriations, particularly one-year funding, has equally deleterious effects on the reservation and the lives of its inhabitants. Tribal governments are frequently looked upon as "bad investments" by Federal agencies.[27] Monies are made available on a short-term basis, often as though any grants made are for "pilot-projects"—not to be taken seriously by anyone outside of the exterior boundaries of the reservation. Make-shift holding centers for orphaned children are thrown up while the tribe obtains a grant to build a permanent orphanage, only to have funding discontinued before beds, medical supplies, food, and child-care personnel can be secured. Children must be sent off the reservation to live with non-Indian families until funding can be secured from another source to fully equip a permanent facility. In the meantime, families are torn apart, children lose contact with their culture, jurisdictional battles ensue over custody once the child has been forced to leave the reservation.[28] These are not merely administrative nightmares.

D. Federal Program Requirements Which Infringe Upon the Sovereignty of Tribal Governments

The focal concern of the Tribal Government Task Force and the 64 tribes surveyed by the task force is that eligibility requirements of Federal programs recognize tribal governments as equivalent to state governments for the direct access to Federal domestic assistance programs.

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[24] Statement concerning Federal Aid Reporting Systems, Senator Jerome T. Hart, Joint Hearing before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations and the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, March 5, 1976.

[25] Appendix I; Chapter IV.

[26] Appendix I; Chapter IV.

[27] Appendix I; Chapter IV.

[28] Appendix I; Chapter IV.

The relationship of Indian tribes to the Federal Government was established by treaties between the two parties—recognizing tribal governments as sovereign nations with inherent rights of self-government. This relationship has been reaffirmed in Federal policy and court decisions which have upheld the definition of tribal sovereignty as the intent of Federal policy. In accordance with this established definition, any arrangement which forces a tribe to come under the jurisdiction of state courts or governments is an infringement on the sovereignty of tribal governments.

However, regulations and statutes of some Federal programs have failed to recognize the independent political status of tribal governments by imposing administrative conditions upon the receipt of Federal program monies which require tribal governments to deal with the state. It is these conditions which tribes surveyed by the task force unanimously oppose.[29] Of these Federal program regulations or eligibility requirements which force tribes to deal with the Federal Government through the state, there are three major tribal-state relationships which are in direct conflict with Federal policy and the concept of tribal sovereignty. These relationships are outlined below with examples of Federal programs which violate the sovereign status of tribal governments.

1. ELIGIBILITY REQUIRMENTS WHICH REQUIRE TRIBES TO FORM CONSORTIUMS OR JOIN INTER-TRIBAL ORGANIZATIONS TO BECOME ELIGIBLE FOR FEDERAL PROGRAMS

The necessity to form consortiums or join inter-tribal organizations to qualify for Federal grants is most often due to a lack of a sufficient population base to be served by a Federal program. Small tribes particularly, fall victim to this stipulation and are forced to seek out other tribes with common areas of need and a willingness to cooperate. Given the geographical isolation of many small tribes and scarce financial resources which preclude travel, it is more often than not, a sheer impossibility for small tribes to identify other tribes in a similar situation and to make the communication necessary for such an alliance. More importantly, the principle of sovereignty recognizes the integrity of a sovereign government to form associations or alliances only upon the discretion of the sovereign, and not as a function of the administrative requirements of another governmental unit. Thus, eligibility requirements such as Section 96.42 of the Comprehensive Employment and Training Act (CETA)[30] which requires that a tribe must represent at least 1,000 persons, immediately places 82.9 percent of Indian tribes under the condition of having to form consortiums or inter-tribal organizations to become eligible for CETA funding, and is in clear violation of the principle of sovereign-chosen alliances.

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[29] Appendix I; Chapter IV.

[30] Public Law 93-201 Sec. 96.42.

2. FEDERAL PROGRAM FUNDS WHICH REQUIRE STATE PASS-THROUGH OR SIGN-OFF.

There are a number of Federal programs which fall into this category, and a far greater number of problems stemming from this process. Requirements of state pass-through or sign-off place the tribal government directly under the control of the state, and more than any other Federal program requirement, infringe upon the sovereignty of tribal governments. One example of a Federal program which places tribal governments under state control is the greatly opposed title XX.

Title XX is a 1974 amendment to the Social Security Act which pertains to the area of social services funding. The Department of Health, Education and Welfare provides 75% matching funds to the states with the responsibility for the delivery of services delegated to the states. Within the broad policy goals provided for in title XX, states are given virtually complete discretion to determine what kinds of services they will provide and the recipients eligible for such services. In the determination of eligibility for public assistance, Indian trust income per capita payments derived from tribal trust resources have not been considered an exempt resource by the states. This is a violation of treaty and trust status of such monies. To compound the problem, the BIA and the Indian Health Service (IHS) have denied social services to tribes in P.L. 280 states maintaining that the tribes are receiving social services from the state under title XX.[31] The state, on the other hand, can maintain that it is the responsibility of BIA and IHS to provide social services to the tribes. The tribes are caught in the middle. In a letter to Mr. Mel Tonasket, president of the National Congress of American Indians, November 3, 1975, the Papago Tribe of Arizona outlined its objections to title XX as follows:

> 1. By granting States authority to set standards of qualification, the States are given the power to usurp or interfere with the sovereign powers of Indian Tribes to govern themselves * * *
>
> 2. By granting States final authority to set standards of qualification, the Federal Government is delegating to the States the power to disqualify Indian Tribes from participation in Federal programs * * *
>
> 3. By granting States authority to set standards of qualification, the States are given implied power to force Indian Tribes to the jurisdiction of State courts in order to meet such standards.
>
> 4. By granting the States authority to select the planning and funding agencies for Federal programs, the State is given latitude to select as such agencies either political subdivisions of the State or contract providers organized by special interest groups, both of which represent constituencies inimical to, or in competition with Indian interests.[32]

Many programs were cited by tribes surveyed as programs which require the subordination of the tribal government to the state, such as the Law Enforcement Assistance Administration programs, Coastal Zone Management Program, food stamp program, and Johnson-O'Malley funds for education. In each case, the main complaint was that tribes should not have to be beholden to the state under any circumstances, since their relationship is with the Federal Government. In addition, tribes cited examples where Federal funds which were supposed to pass-through the state directly to the tribal government, were held by the state in escrow, and apportioned out to the tribe on a basis the state deemed appropriate—the state often claiming that they needed "proof" that the tribe could handle the money and would spend it efficiently.[33]

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[31] Appendix I; Chapter IV.

[32] Letter to Mr. Mel Tonasket, President, National Congress of American Indians from the Papago Tribe of Arizona; November 3, 1975.

In more than one instance, the state has misinterpreted its role in the delivery system clearly going beyond Congressional intent expressed in authorizing legislation, and set itself up to be the final arbiter over all tribal actions. In another case, a state held back monies for education from the tribe until the state was satisfied that the tribe was offering state-accredited courses in its school.[34] When the state investigators discovered that courses on Indian history and Indian culture were available to the students, the state refused to "pass-on" any of the remaining Federal funds maintaining that such courses were not part of the traditional curriculum.[35] Moreover several states were cited as having taken a percentage of the Federal funds due to tribal governments, to cover the costs of alministrating the monies.[36]

These illustrations, and numerous other examples offered by the tribes surveyed, show the state to be in clear violation of any role that was intended for it in the delivery of Federal domestic assistance programs. No where does it call for states to determine how Federal funds should be spent, and no where do the regulations of any Federal program allow the state to appropriate funds for itself under the guise of the state's judgment that monies are being spent unwisely by Federal grant recipients. The list of examples goes on and on, but the obvious conclusion can be drawn immediately—states should be eliminated from the delivery system of Federal domestic assistance programs to tribal governments.

The perpetuation of any state control over Tribal Governments, absent Congressional approval, is a violation of the intent of Congress, the tribe's inherent rights of self-government and the law.

3. INCORPORATION OF CHARTER UNDER STATES VS. RECOGNITION OF TRIBALLY-CHARTERED ORGANIZATIONS

Implicit in the concept of inherent powers of self-government and the recognition of the independent political status of tribal governments is the power of the tribal government to establish tribally chartered organizations. This power has never been abrogated by Federal law, and is indeed recognized in P.L. 93–638 in the definition of the Indian Self-Determination and Educational Assistance Act:

'Tribal organization' means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body * * *[37]

It is the conclusion of the task force that regulations or statutes which require state incorporation or charter are clear usurpations of tribal powers recognized by Federal law and policy, and should be deleted from all Federal program legislation and administrative requirements.

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[33] Appendix I; Chapter IV.
[34] Appendix I; Chapter IV.
[35] Appendix I; Chapter IV.
[36] Appendix I; Chapter IV.
[37] Public Law 93–638 Sec. 4 Definitions.

Task force interviews identified two Federal programs in which a number of tribes were participating that require state incorporation or charter. Discussion of the problems surrounding each is provided below.

Small Business Administration (SBA). Provisions of SBA grants require a tribe to establish a corporation under state guidance before grants will be approved. The requirement of state incorporation gives the state discretion over the eligibility of Tribal Governments for Federal program funds and thereby impinges upon the sovereignty of tribal governments.

Housing and Urban Development (HUD) 701 Program. The HUD 701 Program makes planning and housing moneys available to Indian tribes upon the establishment of a Housing Authority which is required to be a distinct entity separate from the tribal government. This presents an infringement upon tribal sovereignty because Federal programs should not supersede the sovereignty of a tribal government by dictating how that government must organize itself in order to become eligible for a program. The more immediate problem that stems from the establishment of a Housing Authority is that there is no accountability to the tribal government. Indeed, grand jury indictments have recently been handed down on the Navajo Reservation because the Navajo Housing Authority made poor investments with the Federal funds it received, which resulted in the loss of moneys to be used for the construction of homes on the reservation. The tribal council had no control over the actions of the Housing Authority because of the HUD 701 requirements.[38] These requirements prevent the tribal government from assuring its members that funds provided under this program will be appropriately spent, and clearly violate the sovereignty of the tribal government.

E. POTENTIAL SOLUTIONS TO THE PROBLEMS CONFRONTING TRIBAL GOVERNMENTS IN TRIBAL PARTICIPATION IN FEDERAL DOMESTIC ASSISTANCE PROGRAMS

The following discussion provides potential solutions identified by the Task Force to problems confronting tribal governments in their participation in Federal domestic assistance programs:

1. FEDERAL PROGRAM INFORMATION ACT (SENATE BILL S. 3281)

The Committee on Government Operations, in stating the need for S. 3281, concludes, "that beneficiaries of Federal grants programs have a right to the full, fair and timely disclosure of program information and that the Federal Government has a responsibility to make such information readily available. In addition, enactment of the Federal Program Information Act would be an important step in fulfilling this responsibility and reducing the inequities and inefficiencies in the present information system." [39]

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[38] Appendix I; Chapter IV.
[39] Senate bill S. 3281—Federal Program Information Act, Needs for S. 3281.

The Federal Program Information Act has the potential to solve many of the problems tribal governments have traditionally encountered[40] in becoming aware of available Federal programs and determining tribal government eligibility for such programs.

This act would create a Federal Program Information Center which would be required to:

(1) Establish and maintain a data base containing comprehensive information on all Federal domestic assistance programs;

(2) Develop and maintain a computerized information system to provide for the widespread availability of information contained in the data base by computer terminal facilities;

(3) Publish a catalog of Federal domestic assistance programs, containing information from the data base.[41]

If this proposed information system were constructed in a careful and thorough manner, tribes could have access to the information contained in the data base through a telephone call. Thus, if a tribe wished to build a school, a telephone call could secure a print-out containing all information necessary to the undertaking of such a project. The print-out would contain such information as to which Federal programs the tribe is eligible to apply, in order to obtain assistance to construct a school; build a road to the school; provide electrical, heating and plumbing facilities; secure trained educational personnel; obtain textbooks and other instructional materials; provide desks and other equipment; and even curriculum packages available through the computer facilities of the Educational Research Information Clearinghouse.

However, it must be cautioned that in order to make such a data base relevant to tribal populations, the barriers to tribal participation in Federal programs must be carefully analyzed. Statutes and regulations of each Federal program would have to be amended to specify tribal eligibility in each program, otherwise retrieval of information from the data base would be no more meaningful than the information contained in the present Catalog of Federal Domestic Assistance Programs which does not specify tribal eligibility or ineligibility.

2. JOINT FUNDING SIMPLIFICATION ACT AND INTERGOVERNMENTAL COOPERATION ACT OF 1968

The Joint Funding Simplification Act (P.L. 93-510) was enacted by Congress on December 5, 1974,

> "to enable State and local governments (and tribal governments) and private, non-profit organizations to use Federal assistance more effectively and efficiently, and to adapt that assistance more readily to their particular needs through the wider use of projects drawing upon resources available from more than one Federal agency, program, or appropriation."[42]

Although the regulations for the act have just been issued (July 30, 1976), a number of local and state governments, as well as at least one tribal government, have already made integrated grant applications as provided for in the act. As reflected in the title of the act, the Joint Funding Simplification Act attempts to relieve the burden upon Federal grant applicants of the complexities involved in securing grants from the 55 agencies of the Federal Government offering 1,030 Federal domestic assistance programs.

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[40] Appendix I; Chapter IV.

[41] Senate bill S. 3281—Federal Program Information Act. Purpose.

[42] Joint Funding Simplification Act—P.L. 93-510, Purpose.

The great potential of the Act to resolve the problems confronting tribal governments can perhaps best be described by the experience of the Pima-Maricopa Tribe of the Salt River Reservation in Arizona.

Through the concerned efforts of a few enlightened and persevering individuals, the concepts embodied in the Reservation Acceleration Program were finally realized in 1976 under the Joint Funding Simplification Act.

A five-year plan was drawn up for the Salt River Reservation, combining 41 Federal grants into one integrated grant package. Instead of 41 different grants with a potential of 41 sets of eligibility requirements, funding cycles, and reporting requirements, the tribe deals with one Federal grant annually administered by HEW, designated as the lead agency to administer the grant. The process followed in the formulation of the integrated grant package was as follows:

1. Preliminary application.—The tribe develops a comprehensive plan for the development and allocation of its resources. Tribal priorities for development are clearly outlined in the comprehensive plan. The plan has two parts—a one-year plan for the upcoming fiscal year, and a long-range plan, in this case, a five-year plan.

2. Negotiation with the Bureau of Indian Affairs.—The Salt River Reservation has 11 BIA contracts. These contracts were negotiated before the finalization of a comprehensive plan to determine what portion of each tribal priority would be filled by BIA programs.

3. Review of comprehensive plan by the Federal agencies concerned.—Alterations in the tribal plan would be made for one of two reasons:

a. tribe is not eligible under Federal program statutes (where eligibility is an administrative requirement, eligibility requirements which exclude tribes can be waived by the Federal program grant officer)

b. not enough money available in grant program to accomplish tribe's goals

4. Negotiation between tribe and Federal agencies concerned.—Representatives from each Federal agency for whose programs applications are being made, meet with members of the tribal government. Representatives from Federal agencies are those who are responsible for a grant and have the authority to waive administrative requirements where necessary at the time the integrated grant is being negotiated. All administrative requirements can be waived, but not requirements which are part of a statute or Federal program act or authorizing legislation of an agency.

5. Formal application.—A formal application is drawn up by the tribe, accompanied by each agency's commitment for funds and endorsement of the grant package.

6. Transfer of funds.—Each Federal agency transfers funds allocated in the grant package to one agency designated as the lead agency to administer the grant.

7. Letter of Credit.—The lead agency issues one letter of credit to a local bank. The tribe can draw upon the letter of credit at a specified rate. In addition, the flexibility of funds within the grant package allows grant recipients to spend funds in any order as long as allocations under each grant are spent appropriately at the end of the funding year. This eliminates the problem of different funding cycles.

8. Reporting requirements.—The tribe reports quarterly to the lead agency on one grant program.[43]

In addition to great potential of the Joint Funding Simplification Act for tribal governments, the technical assistance needed by many tribes to build up the capacity to administer integrated grants is available through the Intergovernmental Cooperation Act of 1968.[44] Tribes can use the monies allocated under Section 104 of the Indian Self-Determination Act and Educational Assistance Act to provide the matching share for salaries of government personnel (Civil Service Commission matches) requested by the tribal government to provide needed expertise and technical assistance, under the Intergovernmental Cooperation Act.

The Joint Funding Simplification Act enables tribes to have direct access to Federal agencies, and to negotiate one integrated grant, thereby alleviating a majority of the problems now confronting tribal governments in their relationship to Federal domestic assistance programs.

3. COOPERATION OF FEDERAL REGIONAL COUNCILS AND THE BUREAU OF INDIAN AFFAIRS IN IMPLEMENTATION OF THE JOINT FUNDING SIMPLIFICATION ACT

The success of the potentials offered by the Joint Funding Simplification Act is largely dependent on the cooperation of the Federal Regional Councils and the Bureau of Indian Affairs in the negotiation process described above. The development of Indian Task Forces within each Regional Council called for in the Inter-agency Staff Report of Federal Field Organization for Indian Programs could conceivably provide the mechanism for assuring the effective implementation of the Joint Funding Simplification Act. The Bureau of Indian Affairs, as the agency charged with overseeing Indian Affairs, should be responsible for informing tribes of the options available to them under the Joint Funding Simplification Act, and should encourage tribal governments to enter into the negotiation process with full support from the Bureau.

4. RECOGNITION OF TRIBAL GOVERNMENTS AS PRIME SPONSORS FOR FEDERAL PROGRAMS AND RECOGNITION OF TRIBALLY-CHARTERED ORGANIZATIONS

The most important resolution to the problems confronting tribal governments should be the recognition of tribal governments as equivalent to state governments for the direct access to Federal domestic assistance programs. This recognition should be in the form of a Congressional resolution supported by an Executive Order establishing Federal policy which recognizes the status of tribal governments in the Federal domestic assistance program delivery system.

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[43] Process described by Sydney Freeman. Intergovernmental Relations and Regional Operations Divisions, Office of Management and Budget.

[44] 42 U.S.C. 4201 et seq.

Once this Federal policy has been established, eligibility requirements and administrative requirements stipulating state pass-through or sign-off would be in direct conflict with the law requiring tribal governments have direct access to the Federal domestic assistance program delivery system and could be challenged on this basis.

The Task Force supports this approach to the recognition of tribal governments based on its surveys of tribal governments and on discussions held with government officials who endorse this procedure as being the most direct and effective manner to assure that tribal governments have direct access to Federal domestic assistance programs.

Recognition of the sovereign powers of tribal goverments (see Chapter II) includes the recognition of the authority of tribal governments to incorporate or charter tribal organizations for eligibility to participate in Federal programs which require state incorporation or charter of tribal organizations. Federal program requirements which subordinate the tribal government to the state are in clear violation of all established Federal policy and Congressional intent embodied in authorizing legislation, and should be immediately rescinded by the agencies concerned.

5. ELIMINATION OF THE STATE FROM THE DELIVERY SYSTEM OF FEDERAL PROGRAMS TO TRIBAL GOVERNMENTS

Federal policy established by a Congressional resolution and a supporting Executive Order would recognize tribal governments as equivalent to state governments for the direct access to Federal domestic assistance programs. Such a policy would eliminate states from the delivery system of Federal programs to tribal governments on the basis that state delivery of Federal programs and services are in direct conflict with Federal policy.

Recommendations

The Tribal Government Task Force recommends that:

1. An Executive Order and a Congressional resolution should establish Federal policy of Tribal Governments as equivalent to state governments for the direct access to Federal programs and services.
2. Federal program standards and/or eligibility requirements should recognize the authority of tribal governments to create public agencies or corporations eligible for Federal programs.
3. Congress should eliminate eligibility requirements which force tribes to form consortiums, inter-tribal organizations, or affiliate with other tribes to become eligible for Federal programs.
4. Congress should eliminate matching or cost-reimbursable requirements from Federal domestic assistance programs which require tribal governments to put up initial capital before Federal monies can be received.
5. Congress should pass appropriate legislation to insure that funding cycles of Federal domestic assistance programs are made uniform, so that long-range planning of funds can become a realistic function of tribal governments.

6. Congress should enact Senate bill S. 3281—Federal Program Information Act—to increase the availability of information about Federal domestic assistance programs to intended beneficiaries with a special amendment which addresses the delivery of Federal domestic assistance programs to tribal governments.

7. An Executive Order should be issued which calls for the compliance of Federal agencies, Federal Regional Councils, and the Bureau of Indian Affairs in the implementation of the Joint Funding Simplification Act for delivery of Federal programs and services to tribal governments.

CHAPTER V

LAND CONSOLIDATION AND ACQUISITION

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LAND CONSOLIDATION AND ACQUISITION

The Tribal Government Task Force received testimony from a significant number of tribal representatives expressing the view that the question of land consolidation and acquisition was of the most critical nature and should be accorded the highest priority by this task force in our report to the Congress. The overwhelming consensus of tribal opinion as related to use was that maintenance and development of the tribal land base must be regarded as absolutely essential to the survival and growth of the tribe itself. Accordingly, the task force recommends that the American Indian Policy Review Commission and the Congress address the issue of land consolidation and acquisition as a most pressing problem which cries for attention. Regardless of our most sincere efforts in all other areas of the tribal-U.S. relationship, if the Indian land base continues to disappear, the tribes themselves will disappear and the totality of special Indian laws, treaties, programs and services will be rendered completely meaningless for those tribal governments confronted with reservation land bases which were entirely allotted.

The problems of land consolidation and acquisition are most painful and complicated. Almost daily, tribal leaders see individual trust allotments and interests therein being sold and transferred to fee patent, non-trust status. They are constantly aware of the waste of fractionated land holdings being leased in the most undesirable manner by the BIA, simply because it is impossible to gain a consensus of numerous, and oftentimes, remote interest holders. The nature of these problems are discussed from the perspective of the tribal leader in detail in the narrative below as well as analysis of alternative solutions for the consideration of the Commission and Congress. The discussion below is presented in the format of a personal statement and represents the personal convictions of task force member Mr. Jerry Flute, as well as the consensus of the task force.

The issue of Indian heirship law problems in Indian Country must first be reviewed from the historical aspect before one can fully understand the complications that exist today.

Prior to the European occupation, tribes viewed the lands within their territories to be sacred. Sacred because the land was Mother Earth. And Mother Earth was part of the circle of existence, provided by the Great Spirit. This is a universal Indian belief in the religious spiritual context of Indian philosophy and practice. The Great Spirit created all things including Mother Earth. From Mother Earth develops all forms of life and life-giving nutrients. Tribes believe very strongly that all the lands, rivers, mountains, trees and air belonged to the Great Spirit, and every thing that grew from the land, including the Indians, must respect that blessing. Over the years, thousands of disputes between tribes developed because of land territory. At no time did any of the tribes view the territory as their land, but considered the use of the land, rather than ownership. Use of the land and disputes centered around hunting, fishing and grazing. Few disputes over land resulted because of farming. Indians believed and

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still believe, that because of the sacredness of the land, it could not be owned, could not be partitioned, fenced and developed for one individual. Territories were looked upon in the context of tribal use over individual use.

With the coming of the settlers and the subsequent need for land, the concept of land ownership was brought into the country and became part of treaty negotiations with tribes. Many attempts were made to disestablish tribalism and the Federal government found that defining territories as reservations did not contain the ingredients to have the proper effect in breaking down tribalism. Consequently, in the late 1800's, another attempt was made by the Federal Government to divide and conquer tribes by allotting lands to individual members of a tribe. Tribes strongly objected to this allotment procedure and in spite of the objections, Congress passed, in 1887, the Dawes Act, which provided for the allotment of land to each member of the Tribe. The intention of this act was to break down tribalism in hopes of civilizing the Indians.

A selling point in the Allotment Act was to make farmers of the Indian as a first step in civilization. It is apparent that many problems developed in the plan. The first of the problems was that Indians selected their own allotments. In making the selection, the individuals thought first of water and shelter, not giving consideration to the breaking of sod and seeding. They looked for the wooded areas near lakes and streams for protection.

Secondly, treaties promised the necessary agricultural tools of oxen, yokes, plows, etc. The Federal Government did not live up to this provision. Thirdly, a majority of lands selected were not suitable for farming. Had tribes been able to continue in their contiguous territorial holding, perhaps the plan would have worked. As allotments were made and identified, it became apparent that little land was selected in adjoining tracts and the checkerboard effect became obvious. This occurence fell squarely into the scheme for the second phase of the plan: opening reservations to white settlers on those unallotted tracts. Federal negotiations with tribes to sell the unallotted lands were cumbersome and lengthy; but nevertheless, successful in many areas, resulting in the opening of reservations to the Homestead Act. In spite of the tribes' set-back in retaining their territories, it was the Indian who taught the white settler to survive in an alien environment. This act of generosity soon proved to be disastrous to many tribes.

The very homesteaders they helped began encroaching on the Indians' land and eventually bought it for little or nothing. The land base that was not sold began a new era of complexity. A new problem emerged which has yet to be resolved by any Congress, Presidential Administration or tribe. As pointed out earlier, tribes did not accept the individual ownership of land, and as recently as the 1887 Dawes Act, rejected individual ownership. Individual Indians, beginning with the Dawes Act, continued to have a mixed feeling about ownership and had no understanding whatsoever about a "Last Will and Testament". Indians felt that whatever land was assigned or allotted to them could simply be given by word of mouth to whomever they chose. This method of giving was accepted within the family and clan as being the way it should be.

The problem was getting the BIA Superintendent or a probate hearing judge to agree with the gift conveyance. Superintendents and probate judges began relying on existing state and Federal statutes governing probates to determine who the legal heirs were to be. Hypothetically, when Joe Eagle Horse, in 1892, gave his eldest of eight children his 160-acre tract of land, that was accepted within the family. When Superintendent Great White Father and Honorable Justice reviewed Mr. Eagle Horse's probate, they decided that all of his surviving children would inherit one half of the 160-acre allotment and the surviving widow the other half, thereby placing nine heirs on a 160-acre allotment.

The next year, the widow died, and the powers that be decided that the widow's three sisters should inherit one half of her interest and the remaining interest should go to the eight children, now placing 11 heirs to the 160 acres. Ten years later, two of the sisters with husbands and 12 children died and now there are 25 heirs to the 160 acres. This is exactly what has happened to the allotted Indian-owned lands. The problem has magnified to the point that one 72-acre allotment (attached as an exhibit to this report) in the Sisseton-Wahpeton Tribe contains no less than 315 heirs.

The lease revenue derived from this land is at the mercy of the local BIA Superintendent. The reason is obvious—no one heir really cares about the lease because they all have such a small interest. Consequently, the Superintendent will advertise the tract of land as available to a bid lease. Non-Indian farmers and ranchers operating in the same vicinity as available allotted lands, collaborate on who wants to use the land and how much should be bid. Generally, the bid is as low as possible. Surrounding farm/ranch operators, respecting their neighbors, will not bid against each other. Consequently, the 72 acres of farm land is rented for a mere $4.50 per acre when the adjoining non-Indian-owned farmland is leased for $45.00 per acre. The BIA Superintendent then accepts the bid and awards a 3 to 5-year lease, since no other bids have been submitted. To compound this problem, the Bureau of Indian Affairs now has to determine how much of the $325.00 goes to each of the 315 heirs. Since the heirs have begun to accumulate since the 1887 allotment, their shares are proportionately different. The Bureau of Indian Affairs must also collect the rent payment; divide the money; post to each heir's realty account the percentage they have coming; and issue a lease check to the heirs.

In 1972, the BIA realty staff at the Sisseton Agency indicated that the approximate cost per heir transaction was $15.00. This amount covers advertising, selection, collection, posting, paying and cancelling of checks. Simple mathematics reveals a cost to administer this 72 acres of fractionated heirship land of $4,725.00 versus an income from the land of $325.00. The Task Force on Tribal Government has heard testimony urging legislation ("Indian Land Reform") to allow consolidation of tribal lands through eminent domain, solicited and unsolicited purchase. Obviously, with substantial appropriation authority, testimony has urged consideration of the incorporation of FHA (Farmers Home Administration) Indian Land Acquisition loan provisions and provisions of the IRA on revolving loans and grants in addition, to address the total resource development issue rather than limiting land acquisition to agriculture or small public use ventures.

A question which surfaces in the area of eminent domain is: How does a simple land consolidation scheme, to eliminate fractionated heirship, fit into the interpretation of public use? Currently, eminent domain is used for highway rights-of-way, urban renewal, industrial parks, recreational parks, etc. Funding for these projects obviously provide for payment to the property owners at a fair current market value. Provisions also include the right to public hearing and the right to challenge through appropriate courts of jurisdiction. This task force does not see eminent domain as the total answer to eliminating the heirship problem. The following issues need to be considered: (1) Does a tribe interested in exercising eminent domain have the tribal constitutional authority? (2) Does the tribe have resources to pay fair market value? It is the feeling of this task force that a very limited number of tribes could answer "yes" to those questions.

The issue of Indian Land Reform, considering testimony given, requires more extensive research than time permits this task force. It is our understanding that the Commission core staff has undertaken this research and will be considering such legislation. This task force has reviewed, for example, the Washington Law Review article on "Too Little Land—Too Many Heirs: The Indian Heirship Land Problem" dated 1971. It is obvious that extensive research and valid recommendations are contained in this document. This task force recommends that serious consideration be given to this research paper in deliberation for a solution to the heirship problem. Secondly, it should be pointed out that this research document indicates that there have been at least a dozen bills introduced in Congress to enable Indians to halt the fractionation process, but none has been enacted.

Quoting from Stephen A. Langone's article, "The Heirship Land Problem and Its Effect On the Indian, the Tribe, and Effective Utilization," 91st Congress, 1st Session, "Toward Economic Development for Native American Communities," page 543:

> 1. There is no easy simple solution to the problem.
> 2. No solution will meet with the complete approval of all parties concerned.
> 3. A solution to the problem cannot be reached without expenditure of money on the part of those concerned.
> 4. The problem, as it is now constituted, is unmanageable, increasing in scope and requires solution.
> 5. Fractionation is an economic problem for the individual Indian owner, the tribe and the Federal government.
> 6. The Indian owners are a primary concern in any attempt to solve the problem, with the tribe being secondary concern, and the Federal government, third.
> 7. The present administrative and personnel cost to the Federal government could be more effectively used by other Indian assistance programs.
> 8. Possible remedies to reduce or solve the problem include: inheritance restrictions, exchange, sale, partition, escheate and fee title.
> 9. Whatever approach is taken, reservation of minerals in trust, the holding of cash estates in trust, etc. will continue—to some extent—the fractionation, inheritance and record-keeping problem.

It is the recommendation of this task force, that because the problem is complex and requires sole concentration to the issue, that a continuation of time be allowed to address a solution. It is apparent that much time, resources and energy have been expended over the years without a workable plan. It is our feeling that a workable plan can be developed from the research data now available. The Task Force on Tribal Government has spent much time in hearings, securing research data and compiling survey documents to be able to point out a solution which so many have attempted. It is not our intention to "pass the buck" on this problem, but to point out that we have simply not had the time to comprehensively point a direction. We urge the review of resource data which we have collected, as well as the data core staff has available.

CHAPTER VI

SPECIAL PROBLEMS OF SMALL TRIBES

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SPECIAL PROBLEMS OF SMALL TRIBES

There are 481 tribes recognized by the BIA as eligible to contract under the Self-Determination Act. Of that number, 326 have populations of less than 350 members. With small tribes comprising the great majority of recognized tribes, it is no wonder that they complain bitterly of prejudice in the manner in which a number of Federal programs are distributed.[1] Chief among these programs and already touched upon in Chapter Three, is the Self-Determination Program.

Population formula

For the fiscal year 1976 transactional grant period (May 1–September 30), grants totaling $5,999,743 *may* be distributed to 455 tribal governments. "May" is emphasized because although the grants are available on a non-competitive basis, tribes must submit grant applications by August 15, 1976 or their share may be made available to other tribes within the same area office who have established the need for additional funding. As Table I indicates, the use of the population distribution formula clearly works to the detriment and discrimination of small tribes.

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[1] For example, General Revenue Sharing.

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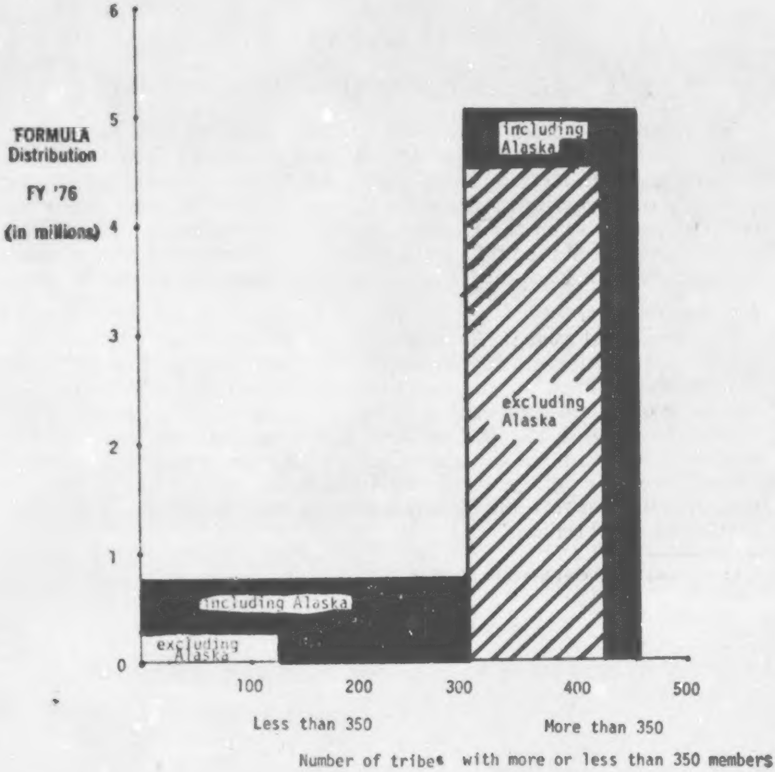
"638" FORMULA DISTRIBUTION FOR FY '76

[by number of small tribes (less than 350
and number of large tribes (more than 350]



With tribes of less than 350 persons comprising almost 66 percent of the total number of tribes eligible to receive self-determination grants, the population formula is even more unequitable. Three hundred tribes are eligible to receive only $773,596 or 12.9 percent of the total Public Law 93–638 share allocation for fiscal year 1976. If Alaska, with 175 villages of less than 350, is excluded, the difference in allocations between small and large tribes is even more dramatic.

Area office	Less than 350	More than 350	Total	Less than 350	More than 350	Total	Less than 350	More than 350	Less than 350	More than 350
Aberdeen	1	14	15	$824	$760,984	$761,808	0.1	99.9	$824	$54,356
Albuquerque	7	16	23	32,572	543,385	566,957	5.8	94.2	4,653	33,399
Anadarko	10	12	22	31,832	268,380	300,212	10.6	89.4	3,183	22,365
Billings	0	9	9	....	466,087	466,087	....	100.0	....	51,787
Eastern	4	9	13	17,460	319,530	336,990	5.2	94.8	4,365	35,503
Juneau	[1] 175	30	205	486,157	488,052	974,209	49.9	50.1	2,778	16,268
Minneapolis	[2] 8	19	27	21,968	396,065	418,083	5.3	94.7	2,746	20,846
Muskogee	[2] 3	7	10	8,235	566,930	575,165	1.4	98.6	2,745	80,990
Navajo	0	1	1	....	266,200	266,200	....	100.0	....	266,20
Phoenix	[2] 17	21	38	43,358	737,081	780,439	5.6	94.4	2,550	35,099
Portland	[2] 16	15	31	41,178	383,005	424,183	9.7	90.3	2,573	25,534
Sacramento	[3] 59	2	61	90,012	39,448	129,460	69.5	30.5	1,526	19,724
Total	300	155	455	737,596	5,226,147	5,999,743	12.9	87.1	2,579	33,717
Excluding Alaska	125	125	300	287,439	4,738,095	5,025,534	5.7	94.3	2,300	37,905

[1] 4 tribes with a zero population.
[2] 1 tribe with a zero population.
[3] 18 tribes with a zero population.

Table 2 shows that of 250 tribes, one-half are under 350 persons and yet, the 125 small tribes are only to receive 5.7 percent of the "638" share allocation for tribes within the lower 48 states.

Small tribe incentives

In his memorandum of June 17, 1976 the Commissioner of Indian Affairs distributed a two-part table entitled, Public Law 93-638 Funding Allocations To Be Obligated During the fiscal year 1976 Transitional Quarter.[2] Section 1 of the Table shows the source of total funding available for fiscal year 1976 and the transitional quarter. The fiscal year 1976 supplement amounts to $7,250,000 and the traditional quarter funds are $800,000 for a total of $8,050,000. Column 2 of section 2 lists what is known as small tribe incentives available to small tribes in each Area Office.

Recognizing that the population formula meant insignificant accounts of money available to a large number of tribes, the BIA designed an incentive program whereby tribes of less than 350 members could qualify for a supplemental grant in addition to their basic "638" share. If a small tribe wishes to receive the supplement, it must either: (1) form coalitions with other small tribes to enter into joint projects which achieve economies of scale provided that the coalition has a combined population of at least 150 persons; or (2) submit single tribe applications for projects which are determined to be particularly viable in relation to the purpose of the Self-Determination Grants Program, provided a tribe has a population of less than 350 persons.[3]

In determining the funding shares of coalitions, the cost factor for the first 150 persons in the coalition is $100 per person rather than $50.[4] Therefore, two tribes of 75 members each could be eligible for a total of $15,000 for a joint project. The emphasis is clearly on coalitions of tribes forming service populations of 150 or less because the funding cost factor of $100 per person only applies to the first 150 persons in the coalition's service population.

On an annual basis, tribes of 150 or less can qualify for no more than $10,000 incentive funding and tribes between 100 and 350 for from $9,950 to $50 incentives, not to exceed $17,500.[5] These figures have been adjusted to provide for 5-month operations for fiscal year 1976; therefore, transitional quarter funding is $4,170 for tribes of 150 or less and varies from $4,119 to $21 for tribes between 150 and 350 persons not to exceed a total of $7,298.[6] The emphasis or priority is clearly in funding tribes which form coalitions. The Tribal Government Task Force has found that many tribes do not want to form consortiums or coalitions for the delivery of services to their members. In addition the incentive that small tribes form coalitions with other small tribes of less than 150 persons is perhaps too limiting. It presupposes that small tribes will be geographically in close proximity to one another which is not always the case. For example, the Flandreau Sioux Tribe is the only small tribe within the Aberdeen Area Office which means that it would be extremely difficult to form a workable coalition with another small tribe outside its area.

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[2] Exhibit 12; P.L. 93-638; Funding Allocations to Be Obligated During fiscal year 1976 and Transitional Period.
[3] Exhibit 8; Commissioner's Memorandum of June 16, 1976.
[4] Note 3, Supra.

Although there should not be priority given to tribes who form coalitions as opposed to submitting single tribe applications if a small tribe wishes to form a coalition with a tribe larger than 150 persons, it should still be able to qualify for a small tribe incentive.

Approximately $908,457 has been allocated in fiscal year 1976 supplemental period for small tribe incentives.[7] The total grant allocation ("638" shares and small tribes incentives) for tribes under 350 persons is $1,682,053 for this transitional period or 24.4 percent of the total amount to be distributed pursuant to the Self-Determination Grants Program. While the Bureau is to be commended for including small tribe incentive funding within the grant program and attempting to distribute the grants on a more equitable basis, nevertheless, nearly two-thirds of all tribes will be entitled to receive only 24 percent of the available grant allocations. Task force findings indicate that the great majority of tribes who can neither salary their chairman, tribal council, nor employ legal counsel are tribes with less than 350 persons.

Relationship of population formula to tribal need

Fiscal year 1977 will be the first full year in which the Self-Determination Grants Program will be operational. As indicated earlier, the funding allocations for fiscal year 1976 only reflect a 5-month period, therefore the funding distribution only reflects approximately 49 percent of the formula. For fiscal year 1977, the budget request for the grant program is $17,160,000 in grants, $4,597,000 in training and technical assistance,[8] and $11,130,000 for contract support.[9]

Although each tribe will receive a larger sum than in fiscal year 1976, 198 tribes with populations of less than 150 persons will be eligible to receive no more than $9,900 each, while 102 tribes with populations of no more than 350 persons will be eligible to receive a maximum of $17,500 each (excluding the small tribe incentive) based on the $50 per person formula.[10] Does the population formula reflect the actual needs of each tribe? Clearly, it does not. Nowhere is independent tribal income taken into consideration nor the ability of a tribe to finance its chairman, council and tribal attorney. There are tribes who are administratively sophisticated; who have personnel systems, accounting and financial management departments. There is no doubt that each tribe can utilize their share of the grant allocation for capacity building purposes, but is that in fact the best utilization of a limited amount of funds? The fallacy of the population formula as applied to the grant program, is that the cost of strengthening tribal government, preparing for contracting or training tribal employees, is not necessarily tied to the population of that tribe. For example, would it cost the Navajos as much money to draft a constitution as it would a small California tribe? If a tribe submits a grant application to improve its tribal court the tribal population is not really a factor in the amount needed to acquire a law library or train tribal judges. Task force findings indicate that poorly financed tribal governments are ones with small populations and limited resources. Under the population formula the greatest number of tribes with the greatest needs receive the smallest allocation of funds.

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[5] Note 3, Supra.

[6] Note 3, Supra.

[7] Note 2, Supra.

[8] Funds will be made available to cover the costs of training tribal personnel in areas such as financial administration, merit personnel system, etc.

[9] Contracts support provides tribes with funding to cover overhead or indirct costs.

[10] Note 3, Supra.

Population formulas should only be used in conjunction with a well-financed small tribes incentive program which does not limit the amount of money each small tribe can receive. A greater portion of the total grant allocation should be discretionary, thus allowing small tribes to submit grant applications which truly reflect tribal needs.

Recommendations

1. Because the population formula for distribution of Federal funds works to the disadvantage of the largest number of tribes having the greatest needs, a population formula should only be used in conjunction with a well-financed small tribes incentive program which:
    a. Does not limit the amount of any grant each tribe can receive;
    b. Allocates grants based on tribal need.
2. Although coalitions should be encouraged among small tribes, it should not be a priority in small tribe incentive funding.
3. Small tribes should not be limited to forming coalitions with tribes of less than 150 persons.
4. The Bureau of Indian Affairs should be directed to undertake a needs assessment of each tribal government to determine tribal capability to finance:
    a. the tribal chairman;
    b. the tribal council;
    c. a tribal attorney;
    d. a tribal administrator; and
    e. a support staff.
5. The Self-Determination Grants Program should continue indefinitely and with increased funding to meet tribal governmental needs as reflected in the Bureau's needs assessment.

CHAPTER VII

TRIBAL GOVERNMENT TASK FORCE ANALYSIS OF TRIBAL GOVERNMENT ACCOUNTABILITY

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Chapter VII

TRIBAL GOVERNMENT TASK FORCE ANALYSIS OF TRIBAL GOVERNMENT ACCOUNTABILITY

The acountability of Tribal Governments to their constituents is a concern which has been expressed by at least one of the Congressional members of the American Indian Policy Review Commission. The Tribal Government Task Force has addressed this issue extensively in its research and surveys of Tribal Governments.[1]

Analysis of the results received from this research has convinced the task force that the accountability of tribal governments is an internal matter of tribal governments, and does not lend itself to recommendations of Federal policy. To this end, the task force will unofficially be issuing a separate report[2] to tribes based on the findings of the task force, with recommendations to tribal governments as to how a tribal government may better organize itself, revise its constitution, or take whatever internal measures which are appropriate to insuring the guarantee of individual rights and due process called for in the Indian Civil Rights Act of 1968.

In order that the Commissioners be fully aware of the thrust of the task force findings and the general nature of task force recommendations to be provided to the tribes, a brief discussion of mechanisms to improve Tribal Government accountability is provided below.

The task force began its work to address the issue of tribal government accountability by analyzing 85 tribal constitutions, selected to provide a representative sample of tribes with varying populations, natural resources, and trust lands. The purpose of this analysis was to identify internal constitutional limitations that would in any way affect the accountability of elected officials of the tribal government, or the procedures by which a tribal official or tribal council could be removed from office, if such action were deemed necessary by a majority of tribal members.

Tribal constitutional analysis revealed that the large majority of tribal constitutions did indeed contain provisions for tribal referendum, recall, and removal of tribally-elected officers.

To the extent that such procedures provided for in tribal constitutions function effectively, and based on Federal policy which recognizes the sovereignty of Tribal Governments, the task force concluded that it was not the responsibility of the task force or of Congress to interfere in the internal functioning of Tribal Governments. Where

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[1] See Appendix I.

[2] The Tribal Government Task Force has obtained private foundation support to issue a separate tribal report on the findings of the task force. The report will focus on task force recommendations to tribes, on the basis of the research of the task force has conducted over the past year.

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such remedies are not provided in tribal constitutions, the task force will suggest to tribes a variety of ways in which such remedies could be guaranteed for all tribal members.

A second area of study conducted by the task force focused upon the separation of powers existing in Tribal Governments. It has been the criticism of some non-Indian onlookers, that too much power is placed in the executive branch of the tribal government. As discussed extensively in Chapter III of the task force report, a major factor in this problem, where it exists, is largely due to a lack of adequate finances to support the basic operations of Tribal Government. More specifically, a lack of funds to finance little more than the salary of the tribal chairman, in many cases means that tribal funds are insufficient to provide a balancing legislative branch empowered to oversee the actions of the executive. Without the financial resources to enable a system of checks and balances provided for in the United States Constitution, it is small wonder that a legislative branch of Tribal Government, comparable in its functions to the United States Congress, cannot exercise its powers effectively.

Because of insufficient tribal funds to compensate tribal council persons, council members are forced to engage in full-time employment outside of the tribal government, and can only devote evenings and weekends to the problems confronting their government. This situation precludes any possibility of monitoring the activities of the Tribal Government on a day-to-day basis. It is unthinkable that the Congress of the United States could function on this basis and adequately represent the concerns of its citizenry.

In similar fashion, a part-time legislative branch is equally unworkable for Tribal Governments.

Thus, in order for Tribal Governments to be truly accountable by the standards set forth in Federal policy and embodied in the Indian Civil Rights Act of 1968, tribal governments must have the financial resources necessary to enable their legislative branches of government to be accorded the status and powers on a tribal level, comparable to those powers accorded to the legislative branch of the Federal Government.

The existence of a fully-functioning independent judiciary is thwarted by the same problem—lack of sufficient financial resources to make the position of tribal judges not only full-time, but positions which are accorded the independent status and powers of a judicial branch of government. Tribal courts should not be subject to partisan influence of any sort, and it is the conclusion of this task force that in order to guarantee the full freedom of the tribal court from political involvement, financial resources and training are needed to insure the protection of due process rights to all parties litigating in tribal courts.

It is worthy of note, that in the task force's investigation of the issue of Tribal Government accountability, the task force found that many tribal governments had taken measures to assure their accountability, over and above traditionally-defined safeguards as outlined in the United States Constitution. Despite limited tribal funds, a number of Tribal Governments have established it as a responsibility of the highest priority—to inform tribal members on a consistent basis of the actions taken by the tribal government. The White Mountain Apache Tribe of Arizona purchases radio time once a week for reservation-wide broadcasts informing tribal members of issues confronting the tribe, decisions made and actions taken by the tribal government.

The accountability of tribal governments is an issue of concern not only to the Congressional members of the Policy Review Commission, but more importantly, a widely-expressed interest of tribal members. The Tribal Government Task Force is happy to report that insofar as Tribal Governments have been allowed to exercise their powers in an arena in which there is mutual recognition of the independent political status of tribal governments, Tribal Government accountability to tribal members is a well-institutionalized practice on the great majority of Indian reservations today.

APPENDICES

APPENDICES

Appendix I.—Index to Tribal Government Task Force Report

Numerical code to indexed documents

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2. Public Hearings; Task Forces 1, 2, 3, 4 & 9; Muskogee, Okla.; May 13–14, 1976.
3. Public Hearings; Task Forces 1, 2, 3, 4 & 9; Oklahoma City, Okla.; May 10–11, 1976.
4. Public Hearings; Task Forces 1, 2, 3 & 4; Missoula, Mont.; Apr. 19, 1976.
5. Public Hearings; Task Forces 2, 3 & 4; Aberdeen, S. Dak.; Apr. 15–16, 1976.
6. Public Hearings; Task Forces 2 & 3; Superior, Wis.; Mar. 19–20, 1976.
7. Public Hearings; Task Forces 1, 3 & 4; Yakima, Wash.; Feb. 4, 1976.
8. Public Hearings; Task Forces 2 & 4; San Marcos, Calif.; Jan. 31, 1976.
9. Public Hearings; Task Force 1, 4 & 10; Sacramento, Calif.; Jan. 20–21, 1976.
10. Public Hearings; Task Force 4; Pierre, S. Dak.; July 28–29, 1975.
11. Exhibits presented at Public Hearings.
12. Field Consultant Report—Quinault Indian Reservation.
13. Field Consultant Report—Makah Indian Reservation.
14. Field Consultant Report—Warm Springs Reservation.
15. Field Consultant Report—Soboba Indian Reservation.
16. Field Consultant Report—Santa Rosa "Tachi" Rancheria.
17. Field Consultant Report—Pyramid Lake Paiute Indian Reservation.
18. Field Consultant Report—Pala Indian Reservation.
19. Field Consultant Report—Uintah-Ouray Reservation.
20. Field Consultant Report—Zuni Pueblo.
21. Field Consultant Report—Sisseton-Wahpeton-Sioux, Sisseton Reservation.
22. Field Consultant Report—Cheyenne River Sioux, Cheyenne River Reservation.
23. Field Consultant Report—Standing Rock Sioux, Standing Rock Reservation.
24. Field Consultant Report—Fort Berthold Reservation.
25. Field Consultant Report—Rocky Boy's Reservation.
26. Field Consultant Report—Laguna Pueblo.
27. Field Consultant Report—Seneca Nation, Allegany Reservation.
28. Field Consultant Report—Northern Cheyenne Reservation.
29. Field Consultant Report—Cheyenne and Arapaho Tribes of Oklahoma.
30. Field Consultant Report—Comanche Tribe of Oklahoma.
31. Field Consultant Report—Creek Tribe of Oklahoma.
32. Field Consultant Report—Navajo Reservation.

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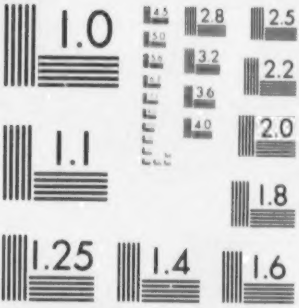
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MICROCOPY RESOLUTION TEST CHART
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Tribal government and sovereignty, Bureau should be an advocate for trust relationship and tribal government/Creek/p. 4–5/31
Tribal judgment funds, supposed to be invested by BIA in best interests of tribe under trust responsibility, attorney reads that bank tribal funds were in had failed, BIA never notified tribe/Quinault/p. 8/12
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BIA agency structure, tribe is one of ten in agency which gives them one-tenth input into priority setting and proposals are often unable to fit into the Band developed by agency for all ten pueblos and funds come within a specific category and are arbitrarily split ten ways even if it means poor utilization and other nine tribes are located on Rio Grande River which means that they have different priorities/Laguna/p. 3/26

Bureau BAND analysis, hinders tribal planning and prioritizing because tribal needs are not reflected and tribal government personnel don't understand system/Warm Springs/p. 5/14

BIA budget, allocation not following tribal priorities, example/Ute/p. 7/19

BIA budget does not reflect established tribal priorities/Ft. Berthold/p. 10/24

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Bureau budget does not reflect tribal priorities/Rocky Boy's/p. 12–13/25

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Tribal input into Bureau budget, tribes suggest that tribes under an area office be allowed to participate in the area's budget analysis which would better reflect needs of tribes and make tribal priorities more clear to area office and would help tribes understand the task of the area office in meeting the needs of all tribes within its jurisdiction/Northern Cheyenne/p. 8/28

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Contract for enrollment procedures under P.L. 93–638, tribe feels that BIA will say this is only a fraction of a position/Quinault/p. 14/12

Contract for entire forestry department, tribe would like to under P.L. 93–638 but BIA will oppose/Quinault/p. 14/12

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Contract for management of fisheries resources, tribe plans under P. L. 93–638/Quinault/p. 14/12

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Contracting under P. L. 93–638, few years may see BIA budget non-existent and no more trust responsibility/Makah/p. 15/13

Contracting under 638, program requirements require professional personnel who are usually non-Indian and can't communicate with Indian people/Mohave Apache/p. 219/(1)

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Self-Determination Act, extend life of act to a minimum period of 25–50 years to test it in conjunction with strong legislation on non-termination policy/Standing Rock/p. 11/23

Self-Determination Act, fear that Federal government has not and will not provide adequate funds under the Act to make contracting and grants an effective reality for smaller tribes/ Rocky Boy's/p. 19/25

Self-Determination Act, guarantee of continued funding/Standing Rock/p. 10/23

Self-Determination Act, lack of awareness and need for training/Pala/p. 3/18

Self-Determination Act, more information should be made available to tribes and effort should be made to provide speakers on the Act who tribal people can identify with and trust/Standing Rock/p. 11/23

Self-Determination Act, need for training/Pyramid Lake/p. 4/17

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Self-Determination Act, need for training to understand/Santa Rosa/p. 5/16

Self-Determination Act, past experience makes tribal official doubt the wisdom of building administrative functions on promises of fund from the BIA and that politics with the Bureau system will hang up fund allocations to the tribes making the result of such legislation questionable/Northern Cheyenne/p. 7/28
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Self-Determination Act, tribe plans for selective contracting to prevent any chance of termination/Creek/p. 9/31
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Self-Determination Act, tribe will not enter into until assurance of maintenance of effort and continued funding/Cheyenne River/p. 11–12/22
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IV. Status of Tribal Government and Federal Domestic Assistance Programs

A. STATEMENT OF PROBLEM

3. Barriers to tribal participation in federal programs

a. Grants with cost-reimbursable or matching requirements

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Eligibility requirements, tribe has difficulty in meeting such as matching requirements when tribe does not have funds or state qualification procedures/Cheyenne River/p. 9–10/22

Eligibility requirements which require tribal matching funds where tribal funds are limited, diminishes availability of services tribal government can provide/Standing Rock/p. 8/23

Federal programs granted on a reimbursable basis, limited tribal participation because tribe does not have available money to spend before it is reimbursed/Zuni/p. 6/20

Federal programs granted on a reimbursable basis, need for money immediate and waiting for fund to spend "up-front" so the tribe can be reimbursed later is problem and cuts down on tribe's ability to serve its members/Zuni/p. 6/20

Federal programs, reimbursement of grant money takes a long time and therefore cannot really meet tribal needs/Makah

Federal programs, requirements for matching funds that cannot be waived/Standing Rock/p. 8/23

Federal programs, some programs call for matching funds and tribe has very little income/Oneida

LEAA, tribal request for waiver of matching requirements, additional expense for tribe to provide operating budgets/Arizona Indian Justice Specialist/p. 192–193/(1)

Reimbursable grants, problems in financing with tribal funds in interim or obtaining loan from banks with interest/Makah/p. 13/13

Revenue sharing requirements/Comanche/p. 7/30

Tribal matching of federal funds, EDA and Employment and career development and revenue sharing and criminal code and adult education and CHR and youth division and environmental health/Ute/p. 5/19

b. Formula grants based on population

CETA, small reservations can't qualify/Soboda

Community development bloc grants of HUD, operates on 1970 census of 600 people for allocations vs. 2,000 people in reality/Quinault/p. 13/12

Department of Labor, allocates funds on basis of 1960 BIA census figures which are now inaccurate/Sisseton/p. 9/21

Department of Labor requirement of size, detriment to small tribes/Zuni/p. 7/20

EDA, requires certain population/Lower Sioux

Eligibility for federal grants and contracts should be based on economic and social needs and land base allocation of tribe rather than on population/Ft. Berthold/p. 14/24

Eligibility, prime eligibility factor should generally be need/Standing Rock/p. 8/23

Eligibility requirements based on population, tribes with smaller populations and large land base are not as economically benefitted as are smaller land base tribes with comparable population—tribes with larger land base have greater governmental burdens and without the financial ability to develop that land base cannot benefit tribal members to the degree smaller land base reservations with larger population can./Ft. Berthold/p. 14/24

Eligibility requirements for application for Johnson-O'Malley funds, discrimination against small tribes/Kaibab Paiute/ p. 152–153/(1)

Eligibility requirements of federal programs, small reservations needs are as much or greater than larger reservations/Bridgeport

Eligibility requirements, populations and land base factors should be secondary and if these factors are used then tribally determined statistics should be used/Standing Rock/p. 8/23

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Eligibility requirements, size of service population, Department of Labor has requirement of 1,000 people which excludes small reservations unless they join a consortium/Pala

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APPENDIX II.—HISTORICAL SUMMARY OF FEDERAL POLICY REGARDING THE INDEPENDENT STATUS OF INDIAN TRIBAL GOVERNMENTS

This paper presents a broad, chronological overview of American Indian self-government within the context of federal Indian policy. Although there are many cases and much legislation relating to tribal self-government, this paper discusses only those that reflect the dominant view of federal policy and those that directly relate to the current status of tribal self-government. The periods of federal Indian policy include: (1) The pre-United States period, (2) the treaty period, (3) the allotment period, (4) the Indian Reorganization Act period, (5) the termination period, and (6) the self-determination period.

I. THE PRE-UNITED STATES PERIOD (COLONIAL TIMES, 1789)

The status of tribal governments depended upon the colonial power in control. During the Spanish conquest of the New World, the avowed purpose of imperial Spain was conversion of the natives and possession of the land for Spain.[1] The Spanish viewed conquered Indians as subjects of the realm and members of the church. In this sense, then, self-government was not an official policy. According to the Laws of Burgos,[2] the Spanish crown and church viewed the ideal relationship of Spanish to Indian to be that of master to servant. The existing system reflected this policy.[3] Curiously enough, however, the Laws of Burgos also contained a provision allowing Indians to live under their own governments as long as they were capable and paid the ordinary feudal dues.[4] Therefore, tribal self-government in the Spanish colonies was conceptually possible as long as it fit into the feudal framework of Spain.

In contrast, the early French colonies were interested first in the fur trade and second in conversion of the natives to Christianity. The Indians of Canada under the French were not subjected to alien rule.[5] In fact, the official policy of France was to encourage the Indians to settle with the French.[6] In this sense, then, the French were the first to openly encourage assimilation.

The English, during the early colonial period, viewed conversion of the natives as a major concern of colonization. King James I, in his charter for colonizing Virginia, expressed the hope that Christianity, civility, and quiet government could be brought to the Indians.[7] Obviously, the notion of quiet government implied submission to the crown. Yet implicit in this concept was local self-government.

Just before and during the 18th century the views of the Spanish, French, and English toward the American Indian changed. Because of the increased competition between these powers for land, trade, natural resources, and power, the Spanish, French, and English used the North American Indian tribes as pawns in the European competition for control of the continent.[8] Between 1689 and 1763 four European wars resulted in colonial conflicts on the North American continent.[9]

During this period the various European powers viewed the Indians as political entities inasmuch as they were considered military allies.[10] As allies they were, of necessity, allowed to govern themselves.

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[1] A. Selso, A History of the Indians of the United States (1970), 20.

[2] Promulgated § 27,1512.

[3] L. Hanke, The Spanish Struggle for Justice in the Conquest of America 24 (1965).

[4] Id. at 24.

[5] A. Selso, supra note 1, at 39.

[6] Id. at 53.

[7] Id. at 40.

[8] Id. at 53.

[9] (1) King William's War (England entered War of the League of Augsburg), 1689–97; (2) Queen Anne's War (War of the Spanish Succession), 1702–13; (3) King George's War (first between England and Spain, merged with the War of the Austrian Succession), 1739–48; (4) French and Indian War (merged with Seven Years' War), 1754–63. A. Selso, supra note 1, at 54–55.

[10] See generally, A. Selso, supra note 1, at 53–57.

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After the French and Indian War, the English formulated a general Indian policy embodied in the Proclamation of 1763.[11] According to the terms of the Proclamation, an Indian reservation bounded on the north by Quebec, on the east by the existing colonies, on the south by the two Floridas, and on the west by the Mississippi River was to be established.[12] The plan was to have a commander-in-chief with power to restrict land sales and regulate trade. The commander-in-chief derived his power from the crown and parliament, not from the colonies. This first attempt at establishing a unified approach to Indian affairs failed primarily because the plan was too expensive to administer.[13]

An alternative was developed in 1767 by which imperial officials and the colonies worked together to establish a definite boundary between land held by whites and land held by Indian tribes.[14] By 1773, the survey was completed and the boundaries were put down on a map. For the first time, England and the colonies officially recognized an area called Indian country.

Following the Revolutionary War, the colonies negotiated with the Indian tribes and signed treaties establishing new boundaries.[15] During this time official policy viewed Indian country politically separate from colonial governments. This separation justified Congressional regulation of travel and trade into Indian country. Licenses were required to trade with the Indians and traders had to give bond to insure observance of the rules and regulations.[16]

Generally the English and colonial officials viewed the Indian tribes as sovereign nations. The signing of treaties, the concern over boundaries, the use of tribes as military allies, and the congressional regulation of trade and travel within Indian country all indicate that Indian tribes were generally viewed as sovereign nations.

II. THE TREATY PERIOD

Two specific phases mark the treaty period: (1) Agreements and treaties between the U.S. and Indian tribes indicating sovereignty of each entity and (2) agreements and treaties that are little more than land sale documents.

The treaty period actually began during the Revolutionary War. The first major treaty established an alliance between the colonies and the Delaware Indians.[17] The language of the treaty reveals that the revolutionary government looked upon the Delaware tribe and territory as a sovereign nation. The treaty allowed colonial troops to pass "through the country of the Delaware nation * * *" and also provided for a military alliance between the Delaware and the colonials by which the Delaware were to furnish troops for the revolutionary cause.[18] In addition, the treaty stipulated that certain standards of justice were to be followed.

"[N]either party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice * * *."[19]

Following this provision, which at first glance appears to recognize the validity of Delaware criminal process, inasmuch as the language of the treaty recognizes the customs and usages of each nation, is a stipulation that the "mode of such tryals [shall] be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of * * * deputies of the Delaware nation * * *."[20] So what at first seems to be a recognition of tribal autonomy in judicial affairs is really a system of Anglo jurisprudence adapted to local necessities.

Article XI of the treaty makes a rather odd provision allowing the Delaware nation representation in Congress.

"And it is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head and have representation in Congress * * *"[21]

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[11] W. Mohr, Federal Indian Relations, 1774–1788 6 (1933).
[12] Id. at 7.
[13] Id. at 7–8.
[14] Id. at 9.
[15] Id. at 108.
[16] Id. at 106–07.
[17] Treaty of September 17, 1778, 7 Stat. 13.
[18] Id.
[19] Id. at 14.
[20] Id.

The above provision suggests that the revolutionary government viewed the Delaware nation as a separate sovereignty and also as a subordinate territory equal in political autonomy to the other colonies. At a time when each colony viewed itself as an independent sovereignty joined with the other colonies in a confederation against the British, this kind of political autonomy was nearly absolute.

The concept of tribal subordination to federal power developed soon afterward. In the Treaty of 1785 with the Wiandot, Delaware, Chippawa, and Ottawa tribes, Art. II provided: "The said Indians do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever."[22]

The subordination existed more in a military than a political sense. Much of the treaty deals with fixing the boundaries of the tribes. This preoccupation with boundaries suggests some degree of political autonomy. In fact, the treaty allows the tribe to treat U.S. citizens as they please if those citizens attempt to settle on the Indian land.[23] The treaty also provides for extradition of any Indians who commit "a robbery or murder on any citizen of the United States . . ."[24]

A treaty with the Cherokees enacted a few months later[25] was similar in its provisions and wording. One substantial difference, however, gave the U.S. power to regulate trade with the tribe.[26] The significance of this provision was that it marked the assertion of federal control to the exclusion of the states. This assertion of power was remarkable, particularly when one considers that the treaty was enacted during the Articles of the Confederation period.

The treaties enacted following the adoption of the constitution followed the same form and content as those treaties enacted earlier. The treaty of 1790 made with the Creek nation contained the familiar provisions: (1) The recognition of peace between the parties, (2) the acknowledgement by the Indians of federal protection, (3) the establishment of boundaries, and (4) the prohibition against U.S. settlement of Indian lands.[27]

Conspicuously lacking from the Creek treaty was any mention of regulation of trade. This absence is explained by the act entitled, "an act to regulate trade and intercourse with the Indian tribes,"[28] which was enacted about a year earlier. This Federal legislation, and the similar legislation that followed, culminated in the permanent legislation of 1834,[29] is important in that it represents the exercise of federal power at the same time it recognizes tribal autonomy.

One reason why the federal regulations of trade with the Indian tribes developed was the concern over boundaries and separation of tribes from the various states. Fundamental in the policy of the Indian Trade and Intercourse Acts is the notion of separateness. The United States, in passing the statutes, intended that Indians should be separate from Americans.

The concept of territorial separation, which was formulated by Congress and executed by the President, was reinforced by the holding in *Worchester* v. *Georgia*,[30] where Chief Justice Marshall first laid out the principles recognizing a right of tribal self-government. The court held that the Federal Government had plenary power in dealings with the Indian tribes to the exclusion of the individual states.[31] In regard to self-government, the court recognized that tribes still had sovereign and independent status despite the fact that the U.S. Government, by terms of a treaty, was protector of the tribal nation.

"[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right to government, and ceasing to be a state."[32]

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[21] Id.
[22] Act of Jan. 21, 1785, 7 Stat. 16.
[23] Id. at 17.
[24] Id.
[25] Treaty of Nov. 28, 1785, 7 Stat. 18.
[26] Id. at 20.
[27] Treaty of Aug. 7, 1790, 7 Stat. 35.
[28] Act of July 22, 1790, C. 33, 1 Stat. 137.
[29] Act of June 30, 1834, 4 Stat. 729.
[30] 31 U.S. (6 Pet.) 515 (1832).
[31] Id. at 560.

Marshall's reasoning succeeded in resolving the seeming paradox of superior federal military power in conflict with the notion of Indian political sovereignty and the right to tribal self-government. He took federal treaties and legislation which never explicitly granted tribes the right to self-government, and read them as a consistent whole in which the very nature and language of the treaties and legislation recognized a pre-existing sovereignty and the concomitant right to tribal self-government.

As the military and economic power of the United States increased and the strength of the various tribes decreased, Indian treaties became more pre-occupied with acquiring land for white settlers. This concern was of course present in the earliest treaties but did not become an overriding policy until the Government sought to remove the Eastern tribes from such areas as Indiana, Ohio, Georgia, Alabama, and Florida.

The Treaty of 1803 with the Kaskaskia tribe is an early example of treaties that were little more than transfers of property. The language of the treaty reveals its purpose.

"Whereas from a variety of unfortunate circumstances the several tribes of Illinois Indians are reduced to a very small number . . . and finding themselves unable to occupy the extensive tract of country which of right belongs to them . . ., the chiefs and warriors . . . being desirous . . . of improvement in the arts of civilized life . . . have, for the considerations hereinafter mentioned . . . ceded to the United States all the lands in the Illinois country . . ."[33]

Between 1817 and 1846 the Federal Government developed the policy of removal[34] which sought to remove the Indian tribes occupying lands east of the Mississippi to areas west of the Mississippi.

The Cherokees,[35] Choctaws,[36] Creeks,[37] and Florida Indians[38] were all moved west through land exchanges and purchases. The Treaty of 1817 with the Cherokee tribe is typical of the treaties during the removal period. By the terms of the treaty, the Cherokee tribe ceded their existing lands to the U.S. Government.[39] For consideration of this cession the U.S. Government granted the tribe land on the Arkansas River and an annuity to the tribes.[40]

The language of these treaties, unlike the ones formed around the turn of the century, did not use the language of international diplomacy. Instead, as in the Treaty of 1817 with the Cherokee tribe,[41] one finds only lip service paid to the rights of the tribal nations.

"And it is further stipulated that the treaties heretofore between the Cherokee nation and the United States are to continue in full force and both parts thereof entitled to all the immunities and privilege which the old nation enjoyed under the aforesaid treaties; the United States reserving the right of establishing factories, a military post, and roads within the boundaries above defined."[42]

Even though the removal treaties of this period concerned themselves with little more than land transfers, the federal policy recognizing the right of tribal self-government continued. The U.S. Supreme Court case, the Kansas Indians,[43] typifies this continuing Federal policy.

The State of Kansas sought to tax lands held in severalty by three tribes: The Shawnee, Wea, and Miami.[44] The State argued that the tribes had become civilized and had ceased to maintain their tribal identity.[45] The state also argued that the individual members of the tribes made use of the various state and county institutions and services, viz., the courts, law enforcement, highways, and schools.[46]

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[32] Id. at 561.
[33] Treaty of Aug. 13, 1803, 7 Stat. 78.
[34] See F. Cohen, Handbook of Federal Indian Law 53–63 (1940).
[35] Id. at 54–56.
[36] Id. at 56–58.
[37] Id. at 58–60.
[38] Id. at 58–62. Treaty of July 8, 1817, 7 Stat. 156.
[39] Id. at 157.
[40] Id. at 158.
[41] Id.
[42] Id.
[43] 72 U.S. (5 Wall.) 737 (1866).
[44] Id. at 737.

Since the primary purpose of taxes was to pay for these services, the state contended that the Indians who had land holding should pay their share of the county and state taxes.

The Supreme Court, in response to these arguments, looked to the language of the original treaties and of the statute admitting Kansas to the Union. The Court cited the statute of admission:

"[N]othing contained in this said constitution [the state constitution of Kansas] respecting the boundaries of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory so long as such rights shall remain unextinguished by treaty with such Indians."[47]

The statute itself and the judicial enforcement of it recognized the existing federal policy in favor of tribal self-government.

Although the State argued that the individual tribes had ceased to be self-governing entities and that individual tribal members were by statute territorial citizens of Kansas and presumptively citizens of the State,[48] the court recognized that the individual tribes still retained a tribal organization and government:

"[I]t was plain that a tribal organization in all three of the tribes was to a greater or lesser extend kept up. Blue Jacket, who filed the bill on behalf of the Shawnees, was himself the Shawnee head chief. There was also a second chief. These Indians had a council, elected for a year, and a clerk of council, and a sheriff, of their own. Also a place where the council and head men met transact business once in each month."[49]

The court indicated that the existence of a tribal organization made the various tribes distinct political entities, notwithstanding the noncontiguous holdings of the individual members.[50] As a consequence the tribal governments and tribal land holdings, whether held in severalty or in common were immune from the operation of state laws.

"As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws."[51]

Perhaps the key words of the Court's language are "national character." The implication is that the tribes are sovereign nations subservient only to the Federal Government, viz, the laws of Congress. The Kansas Indians[52] affirm the federal policy of recognizing the right to tribal self-government. And even though the tribal boundaries had partially decayed because of white encroachment and partial homogenation, the court recognized sovereignty where there was tribal government. Tribal self-government, which once seemed to depend largely on physical separation by means of physical boundaries, now arose because of political separation created by the actual exercise of tribal self-government.

Tribal sovereignty was recognized again in a later Supreme Court case, *Elk* v. Wilkins.[53] In that case the court held that an Indian claiming State and U.S. citizenship under the 14th and 15th Amendments of the U.S. Constitution was not a State nor a U.S. citizen because he owed a higher allegiance to his tribe, which the court viewed as a separate nation. The court stated the tribal Federal relationship as follows:

"The Indian tribes being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations with distinct political communities . . . The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian . . . General acts of Congress did not apply to Indians unless so expressed as to clearly manifest an intention to include them." [54]

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[45] Id. at 748.
[46] Id. at 742–43.
[47] Id. at 740, citing Act of January 29, 1861, 12 Stat. 127.
[48] Id. at 744.
[49] Id.
[50] Id. at 756.
[51] Id. at 757.
[52] Id.
[53] 112 U.S. 94 (1884).

The court's language sums up the federal policy that recognized the sovereignty and separateness of Indian tribes while at the same time imposing dependency of the tribes on the federal government.

Federal policy concerning tribal self-government remained essentially the same throughout the treaty period, even though the federal government increased its power tremendously and the individual tribes lost much of their power, land, and people. At the outset many tribes held enormous tracts of land west of the Appalachias. At the end of the treaty period, because of the removal policy, tribal lands decreased and included only small sections of land in various states west of the Mississippi. Even though tribal land and power steadily decreased, the Federal Government, in its laws and judicial decisions, continued to recognize the right of tribal self-government. In this way the Federal Government affirmed tribal autonomy which could only be limited by treaty, tribal submission, or acts of Congress.

III. ALLOTMENT PERIOD

The end of the treaty period came at a time when Government officials began doubting the policy of separation as embodied in the whole concept of treaty making.

"The advancing tide of settlement in the years following the close of the Civil War dispelled the belief that it would ever be possible to separate the Indians from the whites and thus give them an opportunity to work out their salvation alone. Assimilation, allotment and citizenship became the watch words of Indian administration and attacks on the making of treaties grew in force." F. Cohen, p. 66.

The treaty period was formally ended in 1871 [55] by a provision in a congressional appropriation to the Interior Department. The statute stated: "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty * * *".[56]

The language of this provision seemed to indicate that the federal concept which recognized a degree of tribal autonomy was at an end. However, the reasons for terminating the treaty making power in the President and Senate had more to do with Washington policies than a changing federal policy in the area of Indian affairs. Apparently the House of Representatives was opposed to the treaty system because such a system effectively excluded it from a role in Indian affairs.[57]

As long as the executive branch used treaties to administer Indian affairs, the House, by constitutional provision,[58] had no say in Indian affairs. By eliminating treaties, the House would have a say in Indian affairs. In fact, the second part of the provision abolishing treaty making with Indian tribes at the same time recognized the validity of previous treaties.

"[N]othing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." [59]

In fact, the elimination of treaties did very little to change federal policy. The most significant change was that now the House along with the Senate ratified agreements between the United States and Indian tribes.[60]

The actual change in federal policy occurred with the enactment of the General Allotment Act of 1887.[61] The Federal Government had used allotment as early as 1816,[62] but this treaty with the Chickasaw Nation, by providing for individual ownership of land by the tribal members, marked a new policy behind allotment.[63]

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[54] Id. at 99–100.
[55] By the Act of March 3, 1871, 16 Stat. 544, 566.
[56] Id. at 566.
[57] See Schmeckebier, Office of Indian Affairs 56–58 (1927).
[58] U.S. Const. art 2, § 2, cl. 2.
[59] Act of March 3, 1871, 16 Stat. 544, 566.
[60] F. Cohen, supra note 34, at 67.
[61] Act of Feb. 8, 1887, 24 Stat. 388.

Perhaps the most succinct manifestation of federal policy behind the allotment legislation is the language of the legislation itself. Section 5 of the Act provides for the 25 year trust period whereby the Federal Government acts as trustee, restricting the use of the land to the allottee or his heirs for the stated period. After the expiration of the period, the allotted land was to become wholly alienable.[64] The federal trustee concept sounded much like the guardian relationship manifested in the earlier treaties signed 100 years before, whereby a tribe acknowledged that it was under the protection of the Federal Government.[65] The significant change, however, was in the individual nature of the new relationship. Previously, the Federal Government saw itself as the guardian of the tribe which was a political entity. In contrast, the trust relationship had the government dealing with each individual member. The benefits of the trust went to the individual and not to the tribe.

This individualization of federal policy was likewise reflected in the nature of the allotment. The allotments were to be made in severalty[66] and were to be the size of the normal homestead.[67] Whereas previously the tribe was viewed as the holder of the land, now the land belonged only to individuals. The manner of use also reflected this individualization. A condition of possession was that the allottee take the land as a homestead.[68] The state of title, the size of the grant, and the condition of use came directly from the Anglo concepts of ownership and use of land. Clearly the object of the legislation was to pry the tribal member from the collective tribal entity by distributing the foundation of tribal power to the various individuals of the tribe.

This aim becomes clearer in Section 6 where individual allottees were given U.S. citizenship. Citizenship was also granted to those Indians who had already left the tribe.

"[E]very Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States.[69]

This grant of citizenship, especially for the allottees, reversed the view expressed in *Elk* v. *Wilkins*[70] that Indians, whether or not active members of a tribe, were not U.S. citizens because they owed a prior allegiance to the tribe. Conceptually, then, this statutory grant of citizenship served to negate the notion that Indian tribes were separate political entities, inasmuch as the allottees, by becoming U.S. citizens, ceased to be tribal citizens, at least according to the guideline set up in *Elk* v. *Wilkins*.

Even though the policy behind the General Allotment Act of 1887 was one that sought to break down tribal organization and reform it into the Anglo mold, this policy was never actually carried out. The General Allotment Act provided for a 25 year trust period in which the Federal Government was to act as trustee over the allotted lands.[71] This trust period was to serve both as insurance against alienation to whites and as a transition period. Supposedly at the end of the transition period, the tribal Indian was to become a civilized member of American society, inasmuch as his property holding would become a fee simple.[72] As a private property owner he would be free of tribal ties, which were formerly partially established by tribal ownership of land.

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[62] Treaty of Sept. 30, 1816, 7 Stat. 150. This treaty with the Chickasaw Nation provided for individual ownership of land by the tribal members.

[63] One should note that the desire to free Indian lands for white settlement was a moving force in establishing the allotment system. For a more in-depth treatment, see D. Otis, The Dawes Act and the Allotment of Indian Lands 8–33 (1973). D. S. Otis, History of the Allotment Policy, Hearings, H. Com. on Ind. Aff., 73d Cong., 2d Sess., on H.R. 7902, 1934, pt. 9.

[64] Act of Feb. 8, 1887, 24 Stat. at 389.

[65] See Act of Jan. 21, 1785, 7 Stat. 16.

[66] Act of Feb. 8, 1887, 24 Stat. at 388.

[67] Id.

[68] Id. at 390.

[69] Id.

[70] 112 U.S. 94 (1884).

[71] Act of Feb. 8, 1887, 24 Stat. at 389.

[72] Id.

The trust period, then, was to act as a prospective realization of the Federal policy favoring fragmentation of tribal organization. When the expiration of the trust period drew near, Congress amended Section 6 of the General Allotment Act[73] so that the Section of Interior would have the power to extend the trust period at his discretion.[74] And all such allotments by the terms of the amendment were to remain under the exclusive jurisdiction of the Federal Government[75] which meant that allotments still held in trust were exempt from state taxes. Between 1906 and 1921 Federal policy shifted back and forth on the issue of allotments being subject to state taxation.[76] In any case, however, the tendency of extending the federal trust meant that the realization of allotment policy was continually delayed and never actually achieved the avowed end of civilizing the Indian by severing his ties with the tribe and forcing him to adopt Anglo notions of property, economy, agriculture, politics, family, and happiness.

And although the allotment policy never achieved the goals for which it was intended, it did certainly debilitate the numerous Indian tribes in the United States. Between 1887 and 1934 Indian land holdings diminished from 138 million acres to 48 million.[77] The loss of land caused a parallel decline in material wealth. Furthermore, tribal organization decayed because the land formerly held communally and once the base of tribal power and sovereignty was now held individually.

During this same period, court decisions and Federal legislation served to limit tribal jurisdiction over legal matters. Some four years before the General Allotment Act, the Supreme Court in *Ex Parte Crow Dog*[78] held that the territorial court of Dakota did not have jurisdiction over an Indian who had allegedly killed another Indian in Indian territory. This decision was based on the premise that all power not taken from a tribe by the Federal Government was to remain with the tribe. This holding affirmed the notion of tribal self-government.

The Congress, however, in reaction to this decision enacted legislation granting the Federal Government jurisdiction over enumerated crimes that involved only Indians in Indian territory.[79] This legislation two years before the enactment of the General Allotment Act, represented a major incursion into tribal jurisdiction.

Other Supreme Court cases tended to limit the notion of tribal sovereignty. In *Utah and Northern R. Co.* v. *Fisher*,[80] the court indicated that a reservation was in many instances part of the surrounding state or territory except where forbidden by federal law. In *Langford* v. *Monteith*,[81] the court held that process might be served on a reservation in a territorial court between two non-Indians involved in a civil action and in *Draper* v. *U.S.*,[82] the court held that murder of one non-Indian by another on a reservation was subject to state law and jurisdiction.

The general trend of the allotment period was a weakening of tribal self-government. However, one must realize that the allotment policy of integrating Indians into the American mainstream by means of breaking up reservations and allotting land in severalty was forestalled by the trust period and its extension. The policy of assimilation looked always to the future and perhaps, as a result, never became a reality.

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[73] Id.
[74] Act of May 8, 1906, 34 Stat. 182.
[75] Id. at 183.
[76] See F. Cohen, supra note 34, at 258–59.
[77] Hearings, Comm. on Ind. Aff., 73rd Cong., 2d Sess., on H.R. 7902, p. 16.
[78] 109 U.S. 556 (1883).
[79] Act of March 3, 1885, 23 Stat. 362, 385.
[80] 116 U.S. 28, 31 (1885).
[81] 102 U.S. 145 (1880).
[82] 164 U.S. 240 (1896).

APPENDIX III.—A CASE STUDY OF LAND MANAGEMENT AND LAND USE PLANNING ON THE QUINAULT INDIAN RESERVATION

(Prepared for the U.S. Congress and the American Indian Policy Review Commission's Task Force on Tribal Government by Timothy A. LaFrance, Native American Rights Fund, Boulder, Colo., June 7, 1976)

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C. Tribal Resolution Nos. 1966–1 and 1966–2. November 3, 1966.

D. Tribal Ordinances No. 1 and No. 2. March 25, 1967.

E. Letter dated May 2, 1968, from George M. Folshaw, BIA Superintendent, transmitting letter dated April 26, 1968, signed by Assistant Secretary of the Interior Anderson.

F. "County stalls again on non-Indian owners jurisdiction decision", "The Daily World," Aberdeen, Wash. July 23, 1974.

G. "Quinault zoning issue delayed", "The Daily World," Aberdeen, Wash., May 20, 1975.

H. 'Quinault Zoning Ordinance"; passed Planning Commission on May 20, 1976; forwarded to Business Committee for public hearings in accordance with Quinault Constitution.

I. Work Plan for Land Use Planner, approved in 1976 by Planning Commission and Quinault Business Committee.

I. INTRODUCTION

The Quinault Reservation consists of approximately 190,000 acres of timberland on the Olympic Peninsula in Washington State. It is bounded on the west by the Pacific Ocean, creating approximately twenty-four miles of rugged and beautiful coastline. The primary resources of the area are timber and fisheries. The Quinault Tribe successfully operates both a Tribal Seafood Plant and a Tribal Shake Mill operation.

This report will demonstrate how the Quinault Tribe has exercised its land-use authority. Also, it should become apparent that Tribal control of the reservation land base is essential to the preservation of the unique Quinault environment and to the long-term growth of the Quinault economy.

Section II of this report will examine how the abusive land management policies of the BIA have damaged both the Quinaults' ecology and economy. Such policies have planted the seeds for a we-can-do-it-better attitude on the part of the Quinaults (or, as more popularly phrased, "self-determination").

Section III will trace the circumstances necessitating Tribal land-use control at Quinault. Section III will also analyze the conflict between the Tribe and the neighboring County with regard to planning and zoning for fee patent lands within reservation boundaries.

Section IV will examine the spartan efforts of the Quinault Planning Commission in both administering and developing a land-use control system.

Lastly, Section V will recommend various Federal approaches for aiding Tribal efforts in planning and zoning the use of their reservation lands.

II. BIA ABUSES RE: QUINAULT LAND MANAGEMENT

Like other Reservations, the land of the Quinault Reservation was divided into 80-acre parcels and distributed to individual Indians. Although approximately 27.8 percent of the Quinaults' land eventually became sold or alienated, (the majority of this alienated land is held in fee by 22 logging companies), the BIA supposedly maintained (or by law was required to maintain) a trust responsibility over the remaining 72.2 percent of Quinaults' timberland.[1] However, as Congressional testimony and existing physical conditions so vividly illustrate, the Bureau either neglected or improperly executed its trust responsibilities to the point of nonfeasance, at best, and/or malfeasance at worst.

First, in leasing the timber rights of trust allotments to private logging companies, the Bureau should have been sensitive both to economic and ecological impacts to Tribal members and to trust land. Evidence abounds, however, that the Bureau was derelict in its duty to protect the Indian income and environment while making these long-term leases in at least two ways: (1) selling the timber at substantially less than market value; and, (2) not providing for proper reforestation techniques.[2]

In testimony given on the floor of the U.S. Senate in July of 1956, it was revealed that: "Under the Indian Bureau's long-term contract, the Indians now get an average for all the species on the Quinault Reservation of about $10 per 1,000 board-feet, while the Forest Service's competitive sales bring about $19 per thousand average for a comparable combination of species."[3]

It was further stated that: ". . . not only are the prices which the Indians receive for their timber about half its market value, but also the Indians are paying an uncalled for interest charge."[4]

More specifically: ". . . the Indian was socked with a charge of $1.72 per thousand board feet for interest; and as if this were not enough, the Indians are being charged an additional 23 cents per thousand as profit-and-risk allowance on this interest. This raises the total charge to $1.95 per thousand board feet."[5]

These interest charges were purportedly for the purpose of reimbursing the logging company for advance payments to the Indian where the timber was yet uncut. In determining whether these charges were ever contemplated by the Indians, the following quote is of interest: "However, the contracts contain no express provision that the Indians are to pay interest to the purchaser for these advance payments on timber not yet cut. These interest charges were adopted by the Indian Bureau in October 1955, without prior notice to the Indians."[6]

Aside from these inequitable payments and interest charges under the timber leases, the Quinault economy and ecology were adversely affected by Bureau action, or, more accurately, inaction with regard to long-term protection of the forest resource. Supposedly, the bureau was implementing a rather desirable policy of "sustained-yield" management with respect to leased trust lands. This policy would normally insure a consistent yield year after year *ad infinitum* by selective cutting and proper reforestation (regeneration) techniques. It has been estimated that since 1930, on a decade by decade basis, the optimum "sustained yield" at Quinault could be 200 million board-feet per year.[7]

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[1] "Quinault Comprehensive Plan, Existing Conditions;" submitted by Stevens, Thompson & [illegible], Inc., of Seattle, Wash.; August 1974; page 3. See appendix A.

[2] [illegible] and 54.

[3] [illegible]2 Cong[illegible] Record 14,342 (July 25, 1956) (remarks of Senator Neuberger). See [illegible]ndix B.

[4] Id.

[5] Id.

[6] Id.

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In practice, the average harvest since 1950 has been from 140 to 160 million board feet per year. The threatening reality is, however, that at present trends the cut will be virtually nothing by 1986 (even assuming access problems were solved, the 1986 harvest could be no larger than 5 to 20 million board feet).[8] Even if "sustained yield" were employed from present until 1986, the average yield would be about 75 million board feet per year.[9] This is significantly less than the 200 million board-feet per-year long term attainable average.

What has caused this loss of production worth millions of dollars to the Quinaults? The basic reason is that there has been a lack of regeneration of timberland.[10] For one thing, many BIA contracts had no provision for regeneration.[11] Under these 20 to 40 year leases, the operators were given a "liquidated cut" whereby they could take the products without worrying about regeneration.[12] Indeed, the operators would normally not be concerned with regeneration because by the time their leases expired, 30 or 40 year old replanted timber would not yet ready for cutting. (It takes approximately 50 years for a forest to regenerate under natural conditions.)[13] Since these operators would be using the land only once, they could maximize their profits by reaping the harvest without providing for necessary clean-up or replanting. The result has been reckless logging and highgrading, leaving excess slash and residue on the ground.[14] "This slash creates a potential fire hazard, prevents establishment of new forest crops, and may be a detrimental influence on the fishery production of streams, sometimes to the point of completely ruining a stream."[15]

From the following representative photos of slash left on leased trust lands, it is not difficult for the average viewer to imagine the impediment that such excess slash would impose upon a natural regeneration process or a replanting program:

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[7] Interview with Gary Jensen, forest economist, Quinault Department of Natural Resources and Economic Development, April 9, 1976.
[8] Id.
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] "Quinault Comprehensive Plan, Existing Conditions;" p. 80.
[15] Id.

The following is a typical "power of attorney" form signed by an individual Indian allottee authorizing the local Bureau superintendant to contract for the sale of the timber on the allotment:

POWER OF ATTORNEY FOR SALE OF ALLOTMENT TIMBER

QUINAULT INDIAN RESERVATION, WASH.

Know all men by these presents, that I the undersigned, hereby request, authorize, and empower the superintendent of the Taholah Indian Agency to enter into contract for the sale of the timber upon the following described lands; E2 SW4 sec. 4, T. 22 N., R. 12 W., Willamette Meridian, 80 acres, the same being the allotment of Emma Cleveland (deceased) Quinault allottee No. 1020 and authorize him to perform every act necessary and requisite to the consummation of such sale with the same validity as if I were personally present. *Provided,* That no such contract shall be made hereunder at stumpage rates per thousand feet board measure of less than the following:

Spruce	$4.00	White pine	$3.50
Cedar	3.50	Hemlock	1.00
Douglas-fir	4.25	White fir	1.00

Stumpage is to be paid for on Scribner's decimal C, long scale. Sale of timbe is authorized on a selective cutting plan. And I do also agree to grant any contractor holding any contract hereunder and in conformity herewith, reasonable right-of-way over the above-described lands, or any other lands in which I hold any interest, provided I shall receive reasonable compensation for any damage done or incurred through such right-of-way. The Commissioner of Indian Affairs or his representative shall definitely determine what shall be considered reasonable damages.

I furthermore agree that the proceeds arising from the sale of this timber may be disposed of in accordance with the regulations of the Department of the Interior, including those providing for the payment of the cost of administration.

MARY SEELAM (one-third share).

p. 148, 149, 150 - blank

Little did the signer of this form know that the land[16] would be returned in the sorry and unproductive state as illustrated in the above photos.

Thus, the inescapable conclusion is that the Bureau has failed miserably in its trust responsibilities of insuring Indian income, both short-term and long-term, and protecting the Quinault environment.

Given such failure, it is of no surprise that the Quinault Tribe is embarking on their own program of trust land management. However, effective land and forestry management requires control. Total control of trust timberland is not possible, however, until the expiration of the current bureau logging leases—the last of which expires in 1986.[17] In the meantime, the tribe is utilizing and investigating four basic approaches to controlling their land. They are as follows: (1) Economic acquisition or purchase; (2) legal control of the land; (3) cooperative management agreements; and (4) stewardship, trust, etc.

One primary tribal goal is to purchase land that has been alienated or is in multiple owner trust status. Accordingly, the tribe has applied for and has received approval of a $1.5 million loan from FHA for this purpose.[18] In addition, the tribe is currently drafting a comprehensive "Restoration Bill", which will be a long-term low-interest loan proposal to the U.S. Congress for similar acquisition purposes.[19]

Legal controls include the tribe's active program of land use control through planning and zoning. The Quinault Planning Commission currently exercises control over forestry uses through forestry zoning and the consideration of applications of road construction permits. As will be seen in a later section of this report, the Quinault Comprehensive Plan provides the basis for these land use decisions.

The "Tribal Forest Practices Act" is a second tribally-originated legal control that is currently being developed. The Forest Practices Act will be designed to prevent the timber abuses of the past from recurring. The act will set standards and regulations for timber cutting, logging, slash, clean up, burning and other forestry uses.[20] Enforcement of the act will be essential to the long-term protection of the forestry resource. Like other control devices, however, the enactment, implementation, and enforcement of the Forest Practices Act will depend upon the availability of funding.

Other legal control devices contemplated by the tribe include taxation, condemnation, exchange rights, performance bonds, tribal trustee or stewardship, etc.[21]

The tribe is also investigating the possibility of using "cooperative management agreements" as a device to protect the trust timberland. Cooperative management agreement is a process by which different allottees grant to the tribe the authority to manage on their behalf their interest in their property.[22] It, in effect, puts the tribe in the position of a trustee. It is necessarily premised on the proposition that the tribe can better protect their timber resource than the bureau. Given the track record of the bureau, and given the demonstrated interest of the tribe, this premise is mostly probably correct.

III. THE HISTORY OF THE QUINAULT TRIBAL PLANNING EFFORT

"You are entering the Quinault Indian Reservation. While on the Reservation you are required to conform to tribal laws. All persons who do not accept the jurisdiction of the tribal court are forbidden to enter by order of the Quinault Tribe."

—Sign at Quinault Reservation boundary.

Assertion of tribal authority is not a new concept at Quinault. In spite of destruction attempts involving burning and chainsawing, (The incandescent finish on the face of the sign has proven to be somewhat fire resistant while the metal core of the legs of the sign has posed problems for the teeth of chainsaws.) the large bold-lettered incandescent sign above has faithfully stood sentry at the reservation boundaries since 1972.[23]

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[16] Joint Hearings on Federal Timber Sale Policies Before the Senate Committee on Interior and Insular Affairs and the Subcommittee on Public Works and Resources of the House Government Operations Comm., 84th Cong., 1st and 2nd Sess., p. 1565 (1956).

[17] Quinault Comprehensive Plan. Id., p. 80.

[18] Id., p. 61; interview with Daniel Raas, Reservation Attorney, June 2, 1976.

[19] Interview with Daniel Raas, Quinault Reservation Attorney, April 9, 1976.

[20] Interview with Gary Jensen, Forest Economist, April 12, 1976.

[21] Quinault Comprehensive Plan, Id., p. 62.

[22] Id.

Until the middle 1960's, the tribe had little need for asserting zoning jurisdiction since development on the reservation consisted primarily of logging and related activities. Then, contrary to tribal wishes, development began on a county-approved subdivision located on some of the most beautiful and accessible coastal areas of the reservation.[24] Even though the County [of Grays Harbor, Washington] did not have any zoning ordinances at the time of this particular plat approval, the approval in essence was an assertion of county jurisdiction.[25]

In any event, on November 3, 1966, the Quinault Business Committee responded to this new non-Indian development with resolutions designed to eventually control the use of the land.

They set forth a declaration of policy concerning planning and established a planning commission.[26] Among other duties, the planning commission was directed to make recommendations concerning a comprehensive plan for reservation growth and an implementing zoning ordinance.[27] Accordingly, an interim zoning ordinance was approved by the business committee on March 25, 1967.[28]

On May 2, 1968 the tribe was informed that the Assistant Secretary of the Interior approved of the tribe's zoning ordinance provided that the county "enact the same ordinances to cover lands and persons within the Quinault Indian Reservation which may be subject to its jurisdiction." [29] However, the county did not adopt a zoning ordinance until August 4, 1969.[30] Strangely enough, this 1969 county ordinance did not provide any specific zoning for the Quinault Reservation. In fact, from 1969 until 1974 the official position of the county attorney was that the county did not have zoning jurisdiction over any reservation lands.[31] During this period, therefore, the county did not share the concern of the Secretary of the Interior regarding county zoning of reservation land.

But, the county was subject to increased pressure. Some of the non-Indian landowners of the coastal areas of Quinault preferred opportunities for commercial development.[32] The tribe, however, had zoned the thin strip (from one-quarter of a mile to 1½ miles wide) along the coast as a wilderness zone.[33] Although the wilderness zone allowed individual residences and other real and valuable uses, its primary purpose was to preserve the beautiful coastal areas in their primitive and natural state.[34] The wilderness zone definitely did not contemplate commercial uses. Given this more restrictive tribal zoning, a group of landowners petitioned the county commission to assume zoning jurisdiction on reservation fee patent lands.[35] However, the tribe and other non-Indian landowners at Quinault, opposed the proposal.[36]

The five-year old "hands off" policy of the county was reversed in 1974 by an opinion of the new county prosecutor. It was the prosecutor's opinion that the county could take over zoning jurisdiction of fee patent lands.[37] Based on this new advice, the county commission on June 2, 1975 zoned the fee patent reservation coastal areas Resort-Residential Scenic.[38] (Interestingly, the county did not zone fee patent lands other than coastal areas.) Where the tribe had zoned this same area as wilderness, the county thereby made possible the commercial development of the Quinault coast. Nevertheless, the tribe has informed all concerned that it will continue to enforce its own ordinances.

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[23] Interview with Bill Petite, Chairman, Quinault Planning Commission, April 12, 1976.

[24] Interview with Dan Rass, Reservation Attorney, April 9, 1976.

[25] Id.

[26] Tribal Resolution Nos. 1966–1 and 1966–2. November 3, 1966. See appendix C.

[27] Tribal Resolution No. 1966–2.

[28] Tribal Ordinances No. 1 and No. 2. March 25, 1967. See appendix D.

[29] Letter dated May 2, 1968, from George M. Folshaw, BIA Superintendant, transmitting letter dated April 26, 1968, signed by Assistant Secretary of the Interior Anderson. See appendix E.

[30] Grays Harbor County Ordinance No. 38. August 4, 1969.

[31] Interview with Dan Raas and Mike Taylor, Quinault Reservation Attorneys, July 1975.

See also "County stalls again on non-Indian owners jurisdiction decision", The Daily World, Aberdeen, Wash., July 23, 1974. See appendix F.

[32] "Quinault zoning issue delayed", The Daily World, Aberdeen, Wash., May 20, 1975. See appendix G.

[33] Quinault Comprehensive Plan, Existing Conditions, Id. p. 24.

[34] Tribal Ordinance No. 1. March 25, 1967. See appendix D.

[35] "Quinault zoning issue delayed", The Daily World, Aberdeen, Wash., May 20, 1975.

[36] Id.

[37] "County stalls again on non-Indian owners jurisdiction decision", The Daily World. Id.

[38] Grays Harbor County Ordinance, June 2, 1975.

Given this conflict of zoning authority, the rational approach would be for the tribe and the county each to analyze their position from the standpoint of a land-use planner. The question becomes: What land-use planning principles should govern resolution of this conflict?

First, rational planning requires that adjacent uses be compatible. Given the checkerboard pattern of land ownership on the Quinault Reservation,[39] it is elementary that compatibility could not be accomplished if the tribe were to zone one parcel by one set of standards while the county zoned an adjacent parcel by a different set of standards. This first planning principle of compatibility of adjacent uses mandates that there be a *single* planning and zoning authority.[40]

Second, those people who are most affected by plans should be involved in the planning process.[41] The applicability of this principle to Indian affairs was recognized as early as 1947: "*It is becoming recognized that a plan, no matter how idyllic, which is not favored by the people affected may be doomed to failure.*"[42] [emphasis in original]

A major shortcoming of the county plan is that tribal involvement in the county planning process has ranged from nonexistent to insignificant.[43] For example, the tribe first learned of the first county-approved subdivision (in the mid-1960's) after the developer was given the approval by the county.[44] In contrast, a non-Indian landowner currently sits as a voting member of the Quinault Planning Commission.[45]

Third, a land-use authority must be able and willing to make inspections and enforce its own regulations. In the instant case, it is the policy of the county to make inspections on the reservation "only on request".[46] Of course, a regular county inspection program is made difficult by the necessity of county officials to "carry the platbook" on the reservation in order to determine which lands are (arguendo) subject to county land-use regulations. Moreover, certain county planning staff admittedly find it difficult to justify county planning and zoning intervention in a reservation checkerboard situation.[47] Similarly, it is quite possible that the tribe would find it difficult to justify the zoning of Indian-owned parcels of land within an off-reservation community.

The tribe, on the other hand, stands ready, able, and willing to provide land use regulations for all reservation lands and to guarantee their effectiveness by making inspections and enforcing same.[48] In fact, the next section of this report will demonstrate how the Quinault Planning Commission has been active in the promulgation and enforcement of its land use regulations.

IV. THE QUINAULT PLANNING COMMISSION

Membership

By a 1975 amendment to the zoning ordinance, the membership of the Quinault Planning Commission was established as five voting members and four alternates.[49] The amendment required that one member be from the tribal business committee and that at least one member be from Queets—a community in the north end of the reservation. It also required that the remaining members be chosen from a representative cross-section of the community. Accordingly, a non-Indian presently serves as a voting planning commissioner.[50]

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[39] Quinault Comprehensive Plan, Id. p. 55.

[40] Interview with Jim Coombes, Planning Consultant to Quinault Tribe, April 12, 1976.

[41] Id.

[42] "Ten Years of Tribal Government Under I.R.A.", Theodore H. Haas, Chief Counsel, United States Indian Service, p. 9 (1947).

[43] Interview with Jim Coombes, Planning Consultant to Quinault Tribe, April 12, 1976.

[44] Id.

[45] Id.

[46] Interview with Joseph Eiffert, Grays Harbor County Assistant Planner, April 12, 1976.

[47] Id.

[48] Interview with Bill Petite, Chairman, Quinault Planning Commission, April 9, 1976.

[49] Id.

[50] Id.

Meetings

Since July of 1975 the planning commission has scheduled meetings on a weekly basis. It has been the practice to schedule the meetings in each of the communities of the reservation so as to provide opportunities for increased citizen involvement.[51]

Staff

The staffing demands of the planning commission are being met by a full-time land-use planner, a secretary, consulting services, contributed services from tribal employees, and by the assumption of staffing responsibilities by the planning commissioners themselves.[52]

A new and welcome addition to the staff is Tom Perky, the planner. Tom is a graduate of the masters program in planning at Florida State.[53] Before Tom's arrival, Jim Coombes, of the American Institute of Planners had steadfastly provided planning consulting services to the Tribe—first as a Senior Planner for the Seattle-based Stevens, Thompson & Runyan, Inc., and more recently as a principal in his own firm.[54] Jim is originally from the Quinault area. The author, a law student with academic training and work experience in planning, served as planning advisor to the commission for part of the summer of 1975.[55] Other tribal employees have assisted the Commission significantly, notably Dan Raas of the reservation's attorneys office. But the success of the planning commission in implementing the goals of the comprehensive plan rests primarily in the dedication and determination of the planning commissioners themselves.[56]

Man-Hours

Since July of 1975, the planning commissioners have participated in lengthy weekly meetings. It is estimated that a whopping 630 man-hours were spent in meetings alone between July 1, 1975 and April 10, 1976.[57] Because funding difficulties for a long time prevented the commission from hiring a secretary and a full-time planner, the commissioners assumed technical responsibilities normally performed by staff. In addition, for the same July-April period, approximately 450 man-hours were spent on research and approximately 300 man-hours were devoted by Jim Coombes in professional assistance to tasks assigned by the commission.[58]

Work responsibilities of the commission

The 1975 amendment to the zoning ordinance outlined the following general powers, duties and purposes of the planning commission:

"The purpose of the Commission shall be to implement the land-use aspects of the comprehensive overall general plan as approved by the Business Committee. The Planning Commission shall make recommendations for changes in the comprehensive plan as needed, including complete review every five years. The Commission shall make recommendations to the Business Committee for zoning ordinances, building codes, and proposed land-use projects.

"The Commission may secure assistance from the Bureau of Indian Affairs, public and private planning agencies, and Tribal technical staffs provided that no expense chargeable against the Tribe be incurred without prior approval of the Business Committee.

"The Commission shall also:

"(1) Make inquiries, investigations, and surveys concerning the resources of the Reservation as needed in the Commission's judgment for land-use control purposes.

"(2) Assemble and analyze the data thus obtained and formulate plans for the conservation of such resources and the systematic utilization and development thereof.

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[52] Id.

[53] Interview with Dan Raas, Reservation Attorney, April 9, 1976.

[54] Id. June 2, 1976.

[55] Id. April 9, 1976.

[56] Field assignment for American Indian Lawyer Training Program. June 30, 1976 to August 1, 1976.

[57] Interview with Jim Coombes, Planning Consultant to Quinault Tribe. April 12, 1976.

[58] Id.

"(3) Make recommendations as to the best methods of such conservation, utilization and development.

"(4) Maintain the power to appoint people not on the Commission to voluntarily serve on advisory sub-committees for Planning Commission business.

"(5) Maintain the environmental quality of the Reservation.

"(6) Cooperate with other Commissions and public agencies as required of the Commission to accomplish the purposes.

"(7) Coordinate with economic, natural resource, and human resource planning programs as required of the Commission to accomplish the purposes.

"(8) Require that no project or activity involving land-use, whether Tribal or private, shall be initiated without conforming to land-use and zoning ordinances.

"(9) Utilize staff as budgeted by the Business Committee to assist in carrying out its land-use control responsibilities.

"(10) Possess such powers and shall perform such duties as may now or hereafter be provided by Tribal ordinances."[59]

The 701 comprehensive plan

The three volumes of the Quinault Comprehensive Plan were jointly prepared by tribal staff, planning committees, and the Seattle consulting firm of Stevens, Thompson & Runyan, Inc. The Quinault Business Committee approved this "701 Plan" on August 26, 1974.[60] It is the duty of the planning commission to implement the land-use aspects of the plan through zoning ordinances, subdivision regulations, permit procedures, and other land-use regulations. The following elements of the plan provide the basis of the regulatory effort of the commission: history, goals, economic development, community development, public facilities, housing, land use, transportation, natural resources, human resources, land acquisition, tribal organization, etc.

Accordingly, the planning commission has used the plan as a guide in examining alternative locations for community growth, in determining housing needs, in acting on development proposals, in prioritizing community improvements (street paving), and in recommending a new comprehensive zoning ordinance.[61]

Quinault Zoning Ordinance

Since July of 1975, the comprehensive revision of the tribe's zoning ordinance has probably been the largest (as measured in man-hours) single project undertaken by the planning commission.[62] On May 20, 1976, the planning commission approved a final draft of the ordinance and sent it to the business committee for its consideration. (In addition, the Quinault constitution requires that public hearings be held on the proposed ordinance.)[63] (The draft approved by the commission is included in APPENDIX H herein.) If and when approval becomes final, this comprehensive revision by its terms will replace all existing zoning ordinances that are conflicting or inconsistent therewith (See APPENDIX D). Final approval is expected sometime this summer.[64]

The proposed revision contains numerous significant improvements over the present zoning ordinance. First, the new code provides an assortment of modern land-use control devices. Besides the conditional uses and zoning amendments (rezones) permitted by the old ordinance, the revision employs variances, site development standards, planned unit developments (PUD's), subdivision regulations, performance bonds, etc. Moreover, the uses allowed in each district are well-defined and the application procedures for each permit are clear. Unlike the old ordinance which may be subject to legal attack on grounds that it is "void for vagueness" or that it confers "unfettered discretion" upon the commissioners, the new ordinance establishes tighter standards which must be applied to any given application, including standards for environmental pro-

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[58] Id.
[59] Quinault Ordinance, September 1975.
[60] Quinault Business Committee Resolution No. 49, August 26, 1974.
[61] Interview with Bill Petite, Chairman, Quinault Planning Comm., April 12, 1976.
[62] Interview with Dan Raas, Reservation Attorney, June 2, 1976.
[63] Id.
[64] Id.

tection. Similar to the old ordinance, however, an aggrieved landowner under the new ordinance may appeal the decision of the commission to the business committee. A further appeal can be made to the tribal court.

Obviously, the intensive work of the planning commission in developing this revised zoning ordinance will yield returns in the form of increased control of the reservation land base.

Examples of planning commission actions

1. Due to increasing population pressures in the village of Taholah, the Quinault Housing Authority (QHA is an entity created by the business committee which operates approximately 80 single family dwelling units at Quinault) began preparation of an application to HUD for 50 additional housing units for tribal members.[65] QHA enlisted the aid of the planning commission in determining the extent and the location of the proposed development. Given the population projections for Taholah and a minimum lot size, it was determined that at least 17 acres of land were needed for housing by 1980.[66] Using the "701 Plan", the commission analyzed alternative sites for the development. The QHA and the commission coordinated with the Indian Health Service for the purpose of providing sewage percolation tests. (These tests revealed that a septic tank system on certain sites would be environmentally damaging.)[67] The Bureau of Indian Affairs (BIA), was also contacted for the purpose of determining the availability of road access. After considering costs for the extention of utilities and environmental costs associated with pollution, the site capable of hook-up to the Taholah sewage plant was favored. The planning commission and business committee gave permission for the application to be filed and it was sent to HUD for processing.[68] It is reported that the QHA is now in the process of preparing a preliminary plat of the site for review by the planning commission.[69]

2. In February 1976 the planning commission received an application for the rezoning of a parcel of property located one mile south of the northern boundary of the Quinault Reservation.

Since the property was located in that small corner of the reservation within the political boundaries of Jefferson County, (approximately 95 percent of Quinault is in Grays Harbor County), Mr. and Mrs. Sechrist, the applicants, originally applied to Jefferson County for a permit allowing a trailer park development. Jefferson County, however, "took the position that, while it did not necessarily agree that the Quinault Nation had jurisdiction, the county would not require the Sechrists to obtain any permits." [70] Based on this, work was commenced but was shortly discontinued when a tribal enforcement officer informed the workers on the property of the necessity to obtain tribal permits. One half of the Sechrists' parcel was located in the tribe's wilderness zone. Since the applicants wanted to develop a trailer park and campground complex, they then applied to the tribe for a rezone to tourist.[71] After public hearings on the proposal, the planning commission in April, 1976, denied the application on the following grounds: (1) The development was incompatible with the use of surrounding properties; (2) opposition from a number of area residents; (3) inadequate provision of water supply to property; and (4) lack of police and fire protection.

In May, 1976, the Sechrists' appeal was heard by the Quinault Business Committee pursuant to Tribal Ordinance 48.09. The business committee, however, upheld the determination of the planning commission.[72]

3. In June of 1975 a tribal forestry employee discovered a recently parked mobile trailer in the wilderness zone. The trailer had not received any permits—either from Grays Harbor County or from the tribe.[73] The reservation attorney

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[65] Interview with Elizabeth Cole, Director, Quinault Housing Authority, April 12, 1976.

[66] Id.

[67] Interview with Victor Sansolone, Indian Health Service, Taholah, Wash., April 12, 1976.

[68] Interview with Dan Raas, Reservation Attorney, June 2, 1976.

[69] Id.

[70] Letter to Quinault Business Committee from William V. Vetter, Attorney for Sechrists, April 8, 1976.

[71] Interview with Dan Raas, Reservation Attorney, April 9, 1976.

[72] Id. June 2, 1976.

[73] Id. April 9, 1976.

notified the owner at the owner's Seattle address that the trailer was in violation of tribal ordinances since a tribal permit was necessary.[74] The owner applied for a tribal permit but the planning commission denied the application on the ground that it was in the wilderness zone. The owner appealed to the business committee but the business committee upheld the determination of the commission. The owner did not make any further appeal to the tribal court.[75]

Future activities of the planning commission

It is axiomatic that the planning commission will continue to play a major role in shaping Quinault land-use policy. The commission's influence will lie in its capacity to expand, coordinate, and translate the Tribal informational base into workable courses of action. The routine activities of the planning commission staff in collecting data, making land-use surveys, and participating in coordinated research with tribal and other governmental agencies will enhance the tribe's ability to formulate well-reasoned plans and coordinated land use policies.

With an expanded informational base and with the experience of administering a flexible land-use ordinance, the tribal planning commission will be in a better position to solicit meaningful community input and response and thereby more accurately articulate tribal goals and strategies in the form of plan updates and ordinance revisions. The framework which produces strong land-use policy will build on itself provided the minimum framework is there. This minimum framework must neceessarily include the availability of planning staff and technical assistance to those tribes who are interested and willing to use them. A dust-collecting "701 Plan" is of little use to a tribe that does not have a framework for converting paper into an on-going planning process.

Quinault now has this framework. With the assistance of full-time staff, the planning commission can now more efficiently translate its land management goals into economically and ecologically viable policies. The commission is determined to protect its fisheries and forestry resources and thereby preserve and strengthen the Quinault community. The planning commission forsees for itself major involvement in the areas of setting forest practices standards and, along with the Quinault Department of Natural Resources and Economic Development, recommending timber policies to the business committee.[76] In addition, the commission expects to be very active in establishing regulations for coastal zone management and the repurchase of fractionated allotments and alienated lands.[77] Given proper support, such visions will mature into the reality of tribal self-determination with regard to land management and land-use planning.

Problems

The commission has not been without its problems. A search for funding for a land-use planner led the commission through a parade of closed doors and empty pockets. No money was available under the new self determination act, and it is questionable whether the BIA interprets the act to include new land-use planning functions.[78] The lack of funding for full-time staff slowed the progress of the commission considerably. Although the commission relied heavily on consultant services, the consultant was often saddled with minor office activities such as keeping minutes, files, etc. This inefficiency also delayed the implementation of better development controls as the new zoning ordinance could have been approved much earlier with the assistance of full-time staff.[79] After being turned down by HUD, EDA, and other Federal agencies, the commission eventually found funding in a $25,000 grant from the Office of Native American Programs (ONAP). [For duties of planner, see APPENDIX I] However, it is doubtful that ONAP funds will be able to continually meet the need of all Tribal land-use planning programs.[80]

Besides denying funds for a land-use planner, HUD informed the commission that funds for a plan update (Phase II of the Comprehensive Plan) would not be available until each tribe had their first "701 Plan".[81] This report has earlier discussed the absurdity of having a plan collect dust on a Tribal shelf where there was no framework for implementing it.

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[74] Id.
[75] Id.
[76] Interview with Bill Petite, Chairman, Quinault Planning Commission, April 12, 1976.
[77] Id.
[78] Interview with Dan Raas, Reservation Attorney, April 9, 1976.
[79] Interview with Bill Petite, April 12, 1976.
[80] Interview with Dan Raas, June 2, 1976.
[81] Id.

V. RECOMMENDATIONS FOR INITIATING AND MAINTAINING TRIBAL LAND USE PLANNING SYSTEMS

Indian Tribes must be allowed the opportunity to control their own land base. In order to implement a rational planning program, it is essential that all jurisdictional doubts concerning reservation fee patent lands be resolved in favor of the tribe. It is therefore recommended that Congress enact legislation granting to tribes planning and zoning jurisdiction over all lands within reservation boundaries.

Alternatively, such jurisdiction could be optional with the tribes. When a tribe decided it wanted jurisdiction, it could assume same by a mere tribal ordinance. A third alternative would be to give the tribe a veto over state or local approval of any permit or development affecting reservation lands.

Jurisdiction alone, however, would be a shallow victory for tribal planning if it were not accompanied by sufficient funding for a minimum tribal planning framework. Accordingly, it is also recommended that grants be made available under the Self Determination Act and HUD for the specific purpose of hiring tribal land-use planning staff. Although the plan should be developed concurrently, it is believed that staff is initialy more important than a "701 Plan". The staff could play a major role in the process of developing a comprehensive plan and thereby minimize consultant costs. Also, the staff would be helpful to a planning commission in formulating an interim zoning ordinance. Putting the horse (staff) before the chariot ("701 Plan") would minimize the possibility of dust collecting on an unused chariot. Also, a tribal planner, knowing that he or she must use the plan after the consultants are gone, will more than likely positively influence the quality of the "701 Plan". An "Indian Land-Use Planning Act" should be more than a consultants' relief act.

It is recommended that opportunities for training in land-use planning, building inspection, graphics, and related skills be opened to all interested Indian people. First, special Indian scholarships for such training should be established at academic and technical institutions. Second, an affirmative program should be established which would allow Indian interns or trainees to gain a learning and working experience in city and county government planning offices, building inspectors offices, engineers offices, and private consulting firms. Since a large percentage of reservation jobs are in tribal government, short-term experience in a comparable private or public office may be beneficial. Moreover, many local governments will welcome the opportunity to receive "free" labor. Funds will be necessary, however, for office supplies, etc., and a stipend for the interns or trainees living expenses. This recommendation is designed to promote the development of professional Indian staff for Tribal land management.

Finally, it is recommended that more funding be available for initiating and maintaining Tribal land management and land-use planning programs. Based on the Quinault experience, it is obvious that both the HUD "701" program and the Self-Determination Act do not have sufficient funds for these purposes.

Appendix IV.—Coal Development v. Crow and Northern Cheyenne Tribes

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ACKNOWLEDGEMENTS

This report essentially highlights tribal governmental issues which are specifically applicable to the Crow and Northern Cheyenne tribes; but, the issues discussed herein apply equally to other tribes whose reservations house natural resources potentially attractive to American industry.

I would like to extend a special thanks to Mr. Pat Stands and the Crow people for their hospitality during my visit to Crow in December 1975. As well, I wish to thank Mr. Allen Rowland for allowing me to visit the Northern Cheyenne Reservation.

It should be noted that Mr. Rick Amorose (a third year student at the Law School of Golden Gate University) excellently drafted the "Control of Tribal Resources" section of this report. Ms. Raeanne Malfatti Young patiently performed the burdensome task of typing and organizing the report.

JOSEPH A. MYERS.

INTRODUCTION

This is an evaluation of the functional breadth and effectiveness of the Crow and Northern Cheyenne tribal governments concerning their efforts to control and manage the enormous coal deposits which substantially encrust the subsurface of both reservations. Additionally, this report discusses pertinent subissues which have been raised in conjunction with the above. The data for the report was accumulated during and subsequent to a site visit made by this reporter to the Crow and Northern Cheyenne reservations during the week of December 8, 1975.

The "Task Force on Tribal Governments" of the American Indian Policy Review Commission authorized this report in an effort to determine by case study whether or not tribal governments are asserting or possess the potential to assert governmental authority over tribal natural resources. Since the fossil fuel formation which underlies the Crow and Northern Cheyenne reservations account for more than forty (40) percent of the nation's coal, an examination of the governmental role here can provide a valuable insight into governmental

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planning for other tribes who are facing or will face in the future similar issues concerning their respective natural resources.

The key inquiry of this report addresses the problem that although various Indian tribes have been involved in the development of their natural resources, tribal involvement may or may not be of a capacity which expressly implements the regulatory powers tribes are said to possess.

It has been posited that tribal participation in permit and lease negotiations for natural resource development does not necessarily reflect a tribal government consciously exercising its regulatory powers. Abstractly, this proposition poses no conceptual difficulty, but in actual tribal operation and effect such a distinction becomes substantially blurred. Tribal governments which participate in permit and lease negotiations for tribal surface and sub-surface lands appear to be functioning governmentally and such activity fits neatly within the broad characterization of governmental ability. But, beyond the contractual arrangements made pursuant to such negotiations, have tribes been able to realistically exercise regulatory powers which adequately protect and promote tribal interests?

A prime motivation of the authority which commissioned this report is to demonstrate that Indian tribes do recognize the significance of discharging fully their governmental responsibilities. This recognition is much more comprehensive than a yes/no determination. A mere ignorance of the capacity of governmental power should not be viewed as a non-recognition or rejection of any governmental ability by Indian tribes. It must be remembered that tribal governments historically have been feverishly patronized by federal and state instrumentalities; therefore, in certain instances the above recognition has to be solicitously recommended.

The reader should note that three vital sub-issues run vitally with the subject matter of this report: (1) Questions of governmental taking; (2) Promulgation of effective tribal land use regulations; and (3) Proper and effective enforcement of said regulations. These issues bring into play the functional status of the tribal court as the enforcement guard of tribal interests.

This report will proceed as follows: (1) Historical Note: Crow Tribe, (2) Governmental Appraisal: Crow Tribe, (3) Historical Note: Northern Cheyenne Tribe, (4) Governmental Appraisal: Northern Cheyenne Tribe, (5) Control of Tribal Resources: General Information, (6) Control of Tribal Resources: Social Impact, (7) Control of Tribal Resources: Proposed Developmental Strategies for Tribes, (8) Governmental Powers of Indian Tribes, (9) Conclusion.

CASE STUDY: THE CROW TRIBE

A. *Historical note*

The Crow people are of Siouan origin. After resignation from their ancestral gorup, the Hidatsa, the Crow located in the Valleys of Yellowstone and the Big Horn Rivers in south central Montana and southern Wyoming. This migration is said to have occurred long before the white man appeared in the region. History has it that a sign language reference which meant "simulating the flapping of birds' wings in flight" provided the basis for the white man's labelling these people as the Crow.

Originally the Crow Reservation was created by the Fort Laramie Treaty of 1851.[1] This treaty founded an expansive reservation of land in much of Wyoming, Montana, Colorado, Nebraska, and Kansas for use by several Indian tribes.[2] The Crow people relinquished all claim to this enormous territory in exchange for a reservation located entirely within the area that is now the state of Montana. The new reservation was set apart for the absolute, undisturbed use and occupation of the Crow people. The tribal members who desired to learn the agrarian lifestyle were authorized to select up to 320 acres for their exclusive possession. The grant of land to the tribe pursuant to the treaty included the mineral rights.

A portion of this reservation was ceded to the United States by the Crow people in 1882 for settlement by white settlers with the remaining land to be surveyed for allotment.[3] These allotments were not to be subject to alienation, lease, or encumberance for 25 years and until such time as the President removed the restrictions. Also, in 1882 Congress ratified an agreement which ceded a 400 foot

[1] Kappler at 1066.

[2] Treaty of May 7, 1868, 15 Stat. 649.

[3] Act of April 11, 1882, Ch. 74, 22 Stat. 42.

right of way through the reservation to the Northern Pacific Railroad which included a grant of mineral rights.

A portion of the Crow Reservation was ceded to the United States in 1891 and opened for white settlement.[4] Illegitimate white mining claims on the ceded portion were made legal. Additional reservation lands were opened for settlement with existing Indian allotments preserved in the ceded portion.

Congress in 1917 devalued Crow land holdings by taking away mineral rights which had been reserved to the Crow for surplus plans that had earlier been opened for settlement and homesteading. These lands had previously been valued for coal deposits. Mineral claimants were given the right to occupy surface land which was sufficient to mine and remove the coal, after payment for the damages caused to the surface owners.

The Crow Allotment Act of 1920 provided for the allotment of 640 acres to each tribal member, patents issued in fee or in trust at the discretion of the Secretary of the Interior.[5] Section 6 of the Act reserved all minerals for the benefit of the members of the tribe in common with authority in the tribal council to lease the reservation lands for mining purposes for 10 year periods each subject to the approval of the Secretary of the Interior. At the end of a 50 year period the mineral rights to alloted lands would belong to individual allottees and their heirs. The legislative history here did not expressly address the issue of allottee surface rights.

The Crow Reservation was expressly excluded from the omnibus Tribal Leasing Act of 1938.[6] It wasn't until 1959 that the leasing provisions of the 1938 Act were made applicable to the unallocated lands of the Crow Reservation. Since the Crow Tribe has never incorporated under the Indian Reorganization Act,[7] prior to 1959 it had to rely on older, obscure leasing authorities.

In 1968 Section 6 of the Crow Allotment Act was amended by Congress to reserve the mineral rights in perpetuity for the benefit of tribal members in common.[8] The tribal council is authorized to lease the land for mining purposes subject to the approval of the Secretary of the Interior. But, here again, the statute and the legislative history do not address surface rights.

This parade of legislation has developed a situation wherein mineral rights to allotments on the Reservation are held by individual allottees (including non-Indians) with fee patents, or by the Federal Government held in trust for the Crow Tribe in common.

B. Statistical note

Today, within the exterior boundaries of the Crow Reservation there is a total of approximately 2,282,000 acres of land. Land cessions to the United States, the Northern Pacific Railroad, and the state of Montana have reduced the reservation to this size. Of this amount of acreage, 1,567,827 acres are held in trust by the United States for the benefit of the Crow people: 361,901 acres are tribal (in common) and 1,205,926 are individually allotted. There are approximately 700,000 acres of patent and fee land (primarily non-Indian owned) within the reservation. The reservation land is categorized as follows: (1) Open grazing—1,217,311 acres; (2) commercial timberlands—34,281 acres; (3) noncommercial timberlands—73,331 acres; (4) other wild lands—9,732 acres; (5) dry farmlands—200,761 acres; and (6) irrigated—39,892 acres.[9]

The total tribal membership of the Crow Reservation is 5,846. Of that number there are 4,276 tribal members residing on the reservation. The non-Indian resident population of the reservation is 2,000. The city of Hardin on the northern boundary of the reservation has approximately 373 Crow residents. There are approximately 320 Crow people living in Billings, Montana. Reservation communities with sizaable Indian population include: Lodge Grass, Pryor, St. Xavier, Wyola and the Crow Agency. Also, Ft. Smith which is one mile east of Yellowtail Dam, has a small number of Indian residents. The Crow Agency is the headquarters for the Crow Tribal Government and the Bureau of Indian Affairs.

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[4] 26 Stat. 989, 1040, 1043.

[5] 41 Stat. 989, 1040, 1043.

[6] 25 U.S.C. § 396f.

[7] 25 U.S.C. § 477.

[8] 41 Stat. 751.

[9] See appendix A—Map of the Crow Reservation.

The population of the Crow Tribe has an annual increase of three percent. Approximately sixty percent of the Crow people who reside on the reservation live on their respective allotments. There are not many tribal members who are farm or ranch proprietors because much of the allotted lands are leased to non-Indian farmers or ranchers.[10]

C. Description of the Crow Tribal Government

On June 24, 1948, the Crow Tribe formally organized itself by adopting a written constitution which was amended on December 18, 1961. Pursuant to their constitution, the tribe operates a general council form of government in which all adult enrolled members are allowed to vote when in attendance at general council meetings.[11] To provide a quorum for a general council meeting one hundred or more adult tribal members must be present.

The general council is granted the authority to represent, take action, and speak in behalf of the Tribe in any and all matters and to promote the general welfare of the Tribe and its membership.[12] General council meetings are held on a quarterly basis or more frequently if tribal business so demands.

The chairman, vice-chairman, secretary, and vice-secretary are elected by the tribal council every two years. The tribal council has designated committees and has elected committee members in the areas of credit, education and welfare, enrollment, oil and gas, industrial development, land purchase, and recreation. As well, an executive committee is provided for.

The Crow Reservation is divided into six districts. Each district has a committee representative; however, membership among the various committees ranges from three to fourteen.

The operational costs of the tribal government are paid from tribal income received from land leases, mineral royalties and bonuses, and interest on tribal monies deposited with the United States. For fiscal year 1976 the tribal budget submitted was $905,865.00. The most expensive budget allocation was in the area of community and educational affairs: $161,450.00. The second most expensive budget item is the tribal council and staff salaries at $97,143.00. Ranked third is tribal attorney and litigation costs at $95,000.00.[13]

D. Analysis of the Crow tribal government

The present chairman of the Crow Tribe is Mr. Patrick Stands. During my visit to the Crow Reservation during the week of December 8, 1975, Mr. Stands had little time to discuss at length with me the tribal government issues most pressing to the reservation. He is overwhelmed with tribal business. His long work days include an intense schedule of meetings and conferences. From personal observation and comments made by various tribal members it appears that Mr. Stands functions very effectively as the tribal chairman. He offered his full cooperation to me during my visit to the Crow Reservation.

The effect of coal development is already taking root on the Crow Reservation. Several tribal members remarked to me that many capable tribal people are being persuaded to work for nearby off-reservation coal mining operations where they can earn substantially more money than they would by working for the tribal government. Thus, the salary schedule for tribal officers and staff must now be competitive with the encroaching coal industry.

There appears to be several major imperfections in the Crow governmental system. These flaws are reflected in the tribal officer salary schedule, the general council government structure, the committee scheme, the codification of tribal laws, and the tribal court system.

Aside from the fact that the salary schedule for the tribal officers must presently compete with the coal industry, there is a defect housed in the schedule itself. The chairman and the secretary of the tribe are granted identical salaries. When a governmental entity in its charter or constitution provides for a definite order of authority in its written mandate of responsibilities to be assumed, the officials situated within the hierarchical scheme should definitely not receive equal salaries. It may very well be that both individuals who occupy

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[10] See Appendix B—Outline of the History and General Information, by Mr. Joe Medicine Crow, a member of the Crow Tribe.

[11] See Appendix C—Crow Constitution, Article III.

[12] Id. Article IV, Section 1.

[13] See appendix D for Crow budget for fiscal year 1976.

(here, chairman and secretary) these governmental positions have the capacity to work together quite harmoniously; nonetheless, granting them equal pay buys fuel for substantial conflicts.

The most obvious conflict of the above situation is that of a political power struggle. The chairman and secretary are too close in the governmental structure to avoid such a power struggle if the secretary were of the mind to wage one. The tribe should consider a salary adjustment here to eliminate this defect.

The above statistics illustrate that the Crow Reservation comprises an expansive tract of land. The tribe operates on an annual budget of close to one million dollars.[14] And, there are almost 5,000 Indians residing on the reservation.

Theoretically, the general council form of government should provide full and equal representation to the tribal membership.

There are six political districts which make up the Crow Reservation: The Black Lodge District, the Reno District, the Lodge Grass District, the Wyola District, the Big Horn District, and the Pryor District. The general council must also accommodate the interests of the off-reservation tribal members.

The general council arrangement poses an obvious political inequity regarding general council meetings at any quarterly meeting. The quorum can be comprised of an overload of any one or more districts, making the voting procedure reflective of the special interest of particular districts. The tribal constitution provides for simple majority in voting in all matters presented or coming before the Crow Tribal Council.[15] As well, the outlying districts may be inadequately represented because of the length of travel to the general meetings. It should be noted that despite the inherent defects described herein, statements were made to me that the existing system of government does work.

There was no information available as to the frequency with which a particular district elected a chairman. It is certainly feasible that a given district could monopolize the election of tribal officers if it was densely populated and/or in close proximity to the Crow Agency where the tribal government is headquartered.

Although the Crow Constitution guards the conduct of tribal officers by providing for an executive committee which is representative of all six districts as well as off-reservation members, the effectiveness of the committee may be questionable. There are no specific limitations imposed on the committee.[16] Thus, its role may be determined by the political climate borne by any given tribal chairman. If an election proved to be a heated exchange of views and opinions, the committee could prove to be a negative political side-effect to the newly elected chairman. On the other hand, it could fortuitously work as a positive arm of the tribal government and its chairman. But, the point to be noted is the fact that the committee is politically motivated and not a predictable regulating device of the tribal government.

There are a host of special committees which function pursuant to the Crow Bylaws.[17] I am unable to make a valid assessment of the productivity of these committees. They are created and regulated by council resolution.[18] An illustration of one of the governmental committees is the Committee on Law and Order. This committee was carefully formulated and is responsible for a very critical need of the Crow Reservation: the development of a tribal law and order code.

The law and order commission has completed a fifth draft of a law and order code. The document needs more revision. It is not presently adequate for the objectives it seeks to accomplish. The codification of law and order norms necessitates a comprehensive approach. If the maintenance of law and order is to be accomplished on the Crow Reservation, every aspect of law and order must be considered in the codification process. This draft (fifth) appears to me to be incomplete.

A major source of law enforcement problems presently and in the future is the major highway which cuts through the Crow Reservation (Route 90). This major artery is currently patrolled primarily by non tribal law enforcement agencies.

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[14] See Appendix C.

[15] See appendix C, article VI, section 8 of the Crow Constitution.

[16] See Article VI, Section 9 of the Crow Constitution (Appendix C).

[17] See Appendix C, Article I, Section 4.

[18] See Appendix C for an illustration of a resolution creating a special committee for law and order revision.

Eventually, the Crow will want to assert complete jurisdiction over non-Indians. If such a move is to be constructively undertaken by the Crow, a prerequisite to that action must be the development and enactment of a comprehensive traffic enforcement code. In this highly mobile society of ours traffic laws and the proper enforcement thereof are key factors to the physical movement of the people. It is a reasonable police power of local government for it to promulgate and enforce traffic regulations.

A priority item for the Crow tribal government is the development of a comprehensive traffic enforcement code which will apply to both Indian and non-Indian violators on the reservation.

If tribal jurisdiction is to be asserted over non-Indians on the reservation, traffic enforcement appears to be a vital area to consider.

The codification of tribal laws is lacking on the Crow Reservation. Council resolutions may be passed as a call for the assertion of jurisdiction over non-Indians within the exterior boundaries of the reservation and no one can reasonably deny the validity of such an assertion in light of the fact that such jurisdiction is essential to the local self-government of the tribe. And, it is well settled that Indian tribes do possess the power of self-government within the exterior boundaries of the reservation.

Codification of laws for the Crow people is central to a constructive approach to the future existence of Crow life. The Crow people are no longer isolated in southeastern Montana. Lurking in the background is the massive appetite of the coal industry. This alone necessitates the promulgation of protective land use regulations which guard the interests of the Crow people. All of the natural resources of the Crow Reservation should be regulated by protective statutes developed and promulgated by the Tribe.

Comprehensive codification of tribal laws is only part of a protective package for the future of the Crow people. Once said laws are enacted the enforcement are of the tribal government, the tribal court, must interpret and administer the tribal codes.

While at the Crow Reservation, I had the opportunity to visit the court facilities and briefly interview the chief tribal court judge. The facilities are impressive. The court is housed in a new, modern building. The courtroom is distinctly furnished. There are adequate chambers for the judges and an office for the tribal probation officer. The facilities would rival that of any sophisticated justice court. If facilities were indicative of a court's enforcement capacity, the Crow tribal court would rank highly.

Unfortunately, the above is not the measurement of a tribal court's effectiveness. It seems to me that there is a definite need to either educate the judges who are currently in office about the intricacies of court procedure, due process, and equal protection or undertake an effort of adequate replacement. In my conversation with the chief judge and his associate, I did not receive any signals of judicial competency or efficiency from the parties. I did receive indications of political overtones in the administration of justice by the tribal court. Thus, I would conclude that the ultimate enforcement arm of the Crow Tribal Government definitely needs upgrading.

Between the comprehensive codification of tribal laws and the ultimate enforcement responsibility of the tribal court there are a host of intermediate enforcement roles which must be given serious consideration. For instance, in the area of law and order there must be a definite line established between the BIA police and the tribal police in terms of areas of law enforcement responsibility.

In the area of natural resource protection several key inspector roles must be adequately designed and properly filled. This will require a comprehensive planning and educational endeavor by the tribe. In the face of an enormous interest by non-Indian industry for Crow resources this planning and education is imperative.

In a discussion with a staff member of the Crow Tribe's Office of Coal Research I detected the possibility of a void between the tribal government's approach to the coal issue and that of the Office of Coal Research. It appears that the Tribe is interested in controlled development of the coal resources of the Reservation while the Office of Coal Research is concerned with the discontinuance of any future development of coal on the Reservation. If such a conflict exists, it can only lead to strained relations at a time when effective coordination, proper fact finding efforts, and planning strategies are crucial to the future of the Crow people.

It should be noted that today the Crow tribal government is functioning under highly pressurized conditions; but, the government is functioning despite the handicaps rendered it by the Federal and State governments. One must commend the unselfish energies expended by the tribal chairman and others of the Crow Tribe who are dedicated to their people.

CASE STUDY: NORTHERN CHEYENNE

Historical note

The Cheyenne people migrated westward from the region which is now the state of Minnesota. This migration to the plains occurred late in the eighteenth century. The Cheyenne changed from an agrarian/hunting lifestyle in the Minnesota region to primarily a hunting society on the plains.

Early in the nineteenth century the Cheyenne people situated themselves in the Dakota region and traveled throughout the plains. In the mid-nineteenth century the Cheyenne became divided; and, those who chose to remain between the North Platte and Yellowstone Rivers came to be known as the Northern Cheyenne or the "Morning Star People".

Subsequent to forced removal to the Oklahoma Territory, the Northern Cheyenne people made a devastating, death ridden trek back to their homeland on the northern plains. Finally, in 1884 by Executive Order of President Arthur, the Northern Cheyenne Reservation was created out of lands which had previously been granted to the Crow Tribe.[19]

The Northern Cheyenne Reservation is situated in southeastern Montana adjacent to the expansive Crow Reservation. It comprises 433,434 acres and is substantially smaller than the Crow Reservation which has approximately two million acres.

In the spirit of its then existing policy under the General Allotment Act of 1887[20] of terminating the Indians' communal land holdings and replacing it with private ownership of reservation lands, in 1926 Congress ordered the allotment of specific tracts of land on the Northern Cheyenne Reservation.[21] In Section 1 of the Northern Cheyenne Allotment Act, Congress declared the lands "to be the property of the Northern Cheyenne Indians, subject to such control and management of said property as the Congress of the United States may direct." The Act also provided for the allotment of agricultural and grazing lands not exceeding 160 acres to each of the duly enrolled Indians "now living for whom said reservation was set apart. . . .

Section 3 of the Act and a 1968 amendment provide the substance of a controversy; the resolution of which may well decide the future of the Northern Cheyenne Reservation. Section 3 provides that the timber, coal or other minerals are "hereby reserved for the benefit of the Tribe and may be leased with the consent of the Indian council under such rules and regulations as the Secretary of the Interior may prescribe." This is followed by two provisions critical to the controversy: (1) That at the expiration of 50 years the coal or other minerals "shall become the property of the respective allotees or their heirs," and (2) that the unallotted lands "shall be held in common, subject to the control and management thereof as Congress may deem expedient for the benefit of said Indians."

In 1968, Congress amended the Act by reserving the mineral deposits contained in and beneath the reservation in perpetuity for the benefit of the Tribe, provided the Tribe instituted a lawsuit "to determine whether under the provisions of the Act of June 3, 1926, as amended, the allottees, their heirs and devisees have received a vested property right (in minerals) which is protected by the Fifth Amendment."

A lawsuit was brought by the Tribe pursuant to the above special grant of jurisdiction. It is referred to as the famous *Hollowbreast Case*.[22]

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[19] 1 Kappler at 860.

[20] 24 Stat. 388.

[21] 44 Stat. 690.

[22] 349 F. Supp. 1302 (1972). Also see 505 F.2d 238 (1974).

The district court wherein the suit was brought held that no vested property rights were received and awarded judgment to the Tribe. An appeal followed and the Ninth Circuit Court of Appeals reversed, finding in favor of the individual owners and/or allottees, their heirs and devisees. The Tribe petitioned for a rehearing but it was denied. The Tribe then petitioned for review before the United States Supreme Court. The *certiorari* petition has been granted and the Supreme Court will soon determine the case.

It has been stated that should the Supreme Court find in favor of the allottees in *Hollowbreast* there would then be unfettered coal development at the Northern Cheyenne Reservation. Such may be the case but there is an active landowners' association on the reservation which would agree to the contrary.

It should be noted that irrespective of the outcome of *Hollowbreast*, there can be no permanent foreclosure of coal development at the Northern Cheyenne Reservation. A major portion of the Reservation's sub-surface is attractive to strip-mining interests. The economy of strip-mining and the raging appetite of the nation for energy resources may provide a lethal blow to the efforts to control coal development at the Northern Cheyenne Reservation.

B. Statistical note

Presently, the Northern Cheyenne Reservation comprises some 445,390 acres of land. Approximately 277,636 acres are held in trust for the Tribe. Individual allotments amount to 156,103 acres. Approximately 11,650 acres are held in patent fee. And, 7,865 acres are owned by non-Indians. The Tribe has a land acquisition plan to which is allocated the sum of $1,591,077.65.

The total population of the Reservation is estimated at 3,190 people of whom 2,926 are Indian and 264 are non-Indian, a 1973 census indicates that the enrolled membership is 3,575+. The voting membership of the Tribe is 1,079. To be eligible for membership in the Northern Cheyenne Tribe an individual of Northern Cheyenne ancestry whose name appears on the official census roll as of January 1, 1935 provided that by January 1, 1962 corrections shall be made in said roll by the tribal council subject to the approval of the Secretary of the Interior shall be eligible.

The Tribe has chartered a business corporation but said corporation is presently defunct although the charter remains in effect. Apparently, no tribal enterprises return a profit.

Sources of income on the Reservation include a timber industry, mineral leases, grazing fees, the tribal law and order program, and the Busby School.

In the area of contracting with the Bureau of Indian Affairs, the Tribe contracts the administration and delivery of education for the Busby School, the tribal law and order program and various tribal programs.

C. Governmental appraisal

The headquarters for the tribal government of the Northern Cheyenne Tribe is based in Lame Deer, Montana. Lame Deer is situated at the junction of highways 212 and 315 in the north central portion of the Reservation.

The Northern Cheyenne operate pursuant to a tribal constitution authorized under the 1934 Indian Reorganization Act. The Constitution was adopted on November 2, 1935. It was amended on October 6, 1958 to include Article 9, Section 12: Authority to purchase land by the Northern Cheyenne Tribe. It was further amended on July 8, 1960. This amendment eliminated from the Constitution details regarding the management of tribal property and substituted language on the structure of the tribal government.

A tribal council functions as the law making body of the Tribe. It is comprised of fifteen members who are elected for two year terms of office. To be eligible to run for the council the candidate must be at least twenty-one years of age and be a member of the Northern Cheyenne Tribe.

Mr. Allen Rowland is the tribal chairman of the Northern Cheyenne Tribe. By general election he serves a four year term. To be eligible to run for tribal chairman the candidate must be at least thirty years of age and a blood member of the Northern Cheyenne Tribe. The tribal chairman presides over council meetings and only votes in the event of a tie. His is a salaried position and carries with it the responsibility of conducting tribal business on a day-to-day basis.

There is a tribal court system in effect at Northern Cheyenne which by resolution asserts jurisdiction over non-Indians. There are two tribal court judges who are selected by a two-thirds vote of the tribal council with the approval of the Commissioner of the Bureau of Indian Affairs. The tribal court has an average annual caseload of approximately 4,100 cases. Its annual budget is $83,658.00.

Judge Gardiner, chief judge of the tribal court, was interviewed for this report. He expressed a genuine concern for access to educational training materials for himself and his court personnel. He noted that there are increasing appearances of non-Indian attorneys before his court. The need for training as expressed is so that the tribal court can better cope with increasing non-Indian presence before it.

Unfortunately, the time allocated for a site visit to the Northern Cheyenne Reservation for purposes of this report was only one day. Obviously, in such a short time one could not formulate observations enough to compose a comprehensive analysis of the workings of the tribal governments.

Governmental documents were requested for analysis (i.e., constitution, codes, etc.) but said documents were never forwarded to this reporter.

There was sufficient time to make a brief assessment of the Northern Cheyenne Research Project[32] which operates under the auspices of the tribal council. Principally, the task of the Project is to assess in detail the impact on the Northern Cheyenne Reservation and its people which could result from proposed coal development. It was established in 1973 by a grant from ONAP and is one of the first tribally-controlled research projects in existence. EPA has joined ONAP in supporting the Project on a three year basis for a water/coal research effort. The research strategy includes data gathering concerning social, economic, cultural, environmental, and legal issues.

The scope and objectives of the Project are commendable. And, the research efforts, thus far, appear to be in diligent pursuit of those objectives. However, as indicated in a subsequent section of this report (Control of Tribal Resources), the Northern Cheyenne Reservation is situated in the eye of the target area of coal development in this region. Perhaps, the Project should, as well, investigate the feasibility of tribal land acquisitions outside tthe target area. If an unfavorable ruling comes down in *Hollowbreast*, the tribal government's control over future coal development on the Reservation may well be lost. Furthermore, the mere awesomeness of the coal industry poses a serious threat to that control. Thus, a strategy for land acquisition outside the target area should be viewed as a constructive safety device and a reasonable alternative to the possibility of tribal termination.

CONTROL OF TRIBAL RESOURCES

Physical transformation—part 1

The Crow and Northern Cheyenne Reservations house coal deposits which are the most attractive to coal developers of any in the Northern Great Plains. If this coal is mined and used to fuel the huge energy producing projects that are planned for the West, the economic and social patterns of the affected states will be changed from rural agrarian to mining, and perhaps to urban industrial. The Crow and Northern Cheyenne Reservations would stand at the heart of this transformation. This is probably the most crucial social, environmental, legal and institutional detriment confronting the Indians today. Bob Bailey, a Northern Cheyenne says, "The question is, do we perpetuate ourselves or do we extinguish ourselves? The very land we stand on, sleep on, eat on, will be torn up. This is our last piece of land, and if we lose it we will be Indians without lands in the future."

Between 1969 and 1971, the Northern Cheyenne Tribe auctioned prospecting permits for 52 percent of their reservation (243,000 acres) for approximately 2.5 million dollars. Six of these prospecting permits owned by the Peabody Coal Company have been converted into leases. Peabody has pledged five hundred million tons of coal from its leases to supply at least two gasification plants which will be built near the Reservation by Northern Natural Gas Company and City Service Gas Company jointly. The first plant is scheduled for completion in 1979.

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[32] See Appendix E for Project Objectives.

Consolidation Coal Company, a subsidiary of Continental Oil, has asked the Northern Cheyenne to lease an additional 70,000 acres. The company would like to build four gasification plants on the reservation. The thirty million tons of coal needed to fuel them each year would be strip-mined from this lease tract.

Shell Oil, American Metals Climax (AMAX) and Westmoreland Resources hold leases to 75,358 acres on the Crow Reservation adjacent to Northern Cheyenne. Westmoreland has already invested thirty-four million dollars in strip-mining operations and plans to mine four million tons each year. The company has contracted to supply nearly eighty million tons of coal over the next twenty years for midwestern utilities. Three hundred million more tons of Crow coal have been optioned to Colorado Interstate Gas Company to be used in a gasification plant that is now planned in Montana.

The effect of strip-mining is that it destroys the economic role of the surface land during mining and the existing surface ecosystem permanently. A debate is now raging over the true reclamation potential of stripped land. The land loses its usefulness for any purpose other than mining while coal is being stripped. In the Northern Plains there is enough moisture and fertile soil to support farming. Wheat yields are among the highest of any part of the country, and cattle ranchers only need two to two and one-half acres a head per month. As food prices escalate, this land is becoming more valuable to farmers and to the nation.

In addition to the temporary dislocation that strip-mining causes, some evidence suggests that the surface is permanently altered. Drag lines remove the top soil along with the overburden, destroying the ecosystem which is developed by slow centuries of biological succession. Deep pits disrupt the ground water system, causing the water table to fall and creating hydrological repercussions in areas far from the mine site.

Coal seams are the principle aquifers or underground waterways, in the Northern Plains. They are often close to the surface, providing the underground irrigation that makes much of that arid area surprisingly lush; but, this very closeness to the surface also makes the seams attractive to strip-miners. Once they are removed, ground water must find new channels. It often goes deep underground, leaving reclaimed areas too dry to support the kinds of vegetation that grew there before the land was stripped.

Stripping also contaminates surface runoff water with subsoil chemicals that are shaken lose during the digging, in addition to areas where the overburden is dumped or defaced with sterile spoils banks.

The National Academy of Sciences (NAS) report, "Rehabilitation Potential of Western Coal Lands," was released in the Fall of 1973. Probably the most comprehensive document on the reclamation to date, the report bluntly states that restoration of stripped lands "is not possible anywhere." What is possible, at best, is the rehabilitation of the land to a stable ecological state that does not contribute to environmental destruction and is consistent with surrounding aesthetic values. Carl Wambolt, Ph. D., rain specialist at Montana State University, says "[r]eclamation efforts in the West have not yet provided the diversity and other characteristics required to return mined lands to their former wildlife carrying capacity."

No strip-mined land in the West has been successfully reclaimed to date. The President's "Council on Environmental Quality" concluded in a recent report to the Senate Committee on Interior and Insular Affairs that "acceptable reclamation of these semi-arid lands is yet to be demonstrated."

Tom Higgins of Peabody Coal maintains, "We're not stripping unless we're sure we can reclaim, we don't want any bond forfeitures . . . when we talk about revegetation, we are talking about permanent vegetation, and we are incorporating native grasses wherever possible. We are sure we can reclaim and revegetate." Mr. Higgins is not quite as confident today. His early efforts to revegetate with native grasses have failed and he is now looking to exotic grasses to provide the kind of revegetation that he hopes will be successful.

AMAX public relation officer, Blake Caldwell, told CEP that the company had begun to reclaim stripped land in the Midwwest in 1946, and "we hope to be equally successful in the West." Stressing the need for research, Caldwell noted, "We are looking at all types of grasses. We don't know which grasses will work, but we are confident that we will find the right combination." Complaining that "environmentalists want the land to be like the eastern seaboard," Caldwell added, "We're talking about putting a sprig of grass every hundred feet . . . it is our hope to achieve revegetation."

What the coal industry does not provide is a guarantee of success, an assurance that many people feel is impossible to make. Newsweek reported in October, 1972, that "While the coal operators may indeed restore the land, the record so far is not good . . . while the companies say they will spend as much as $500,000 an acre to restore land only few test projects dot the mound of rubble."

Ed Dobson of "Friends of the Earth" observes that many of the grasses which are being grown on reclamation test plots are annuals which grow one season. If they don't reseed, the ground is soon as barren as previously.

The Northern Plains Resource Council (NPRC), a coalition of ranchers in eastern Montana, points out that even if some test plots are revegetated successfully, so much fertilizer, seed, and water would be needed to maintain them that the cost would be prohibitive and quantities of water unavailable to apply the method on a large scale.

Bill Mitchell, a biologist with the NPRC says, "In Ohio AMAX planted Crown Vetch. Its forage value is not very high. From a rancher's point of view, that's not reclamation. It's a question of semantics. What does reclamation mean? That they can get something to grow, or that they've created a successful reproducing ecosystem?

"They're mining native perennial range here in Montana. That short grass prairie is some of the best beef country in the world. The annual grasses they plant on the reclamation plots are very invasive, squeezing out the perennials on good land, so you get double damage. Burlington Northern smoothed over a lot of fifty-year old spoils banks and planted rye with water and fertilizer. No rancher in his right mind wants that in his hay. They can't grow alfalfa, and they plant a lot of it.

"They don't know whether these revegetated spots will survive in extreme season. That will take years. They'll have to use biological succession (the progression of plant communities from the simple to the complex; each stage prepares the soil for the succeeding community), and that takes time. Acceptable reclamation for a rancher would be the development of a native perennial range.

"I think revegetation is a kind of red herring because no one claims they can restore the ground water.

"They want to mine the lush meadows. That's sub-irrigated pasture land, the water is near the surface. They don't know how to restore a sub-surface aquifer."

Carl Wambolt warns, "If strip-mining proceeds in Montana at this time it will be without the insurance that successful reclamation will be able to be achieved. Only time will ultimately furnish us with proof as to the degree of success various reclamation efforts accomplish."

The NAS study determined that over and above the willingness of corporations to invest large sums of money in reclamation programs, the amount of rainfall in an area is the "limiting factor" in reclamation. NAS concluded that areas that received over ten inches of rain a year have a "high potential" for reclamation if large sums are expended on the effort over a number of years. About sixty percent of western coal lands, including the Northern Plains, receive more than ten inches of rain a year. According to an editor of the "Western Oil Reporter," Douglas Gill, "Reclamation standards in semi-arid western states may be little more than wishful attempts to legislate grass." Sierra Club Research Director, Robert Currie, maintains that successful long term reclamation of strip-mined land in the semi-arid plains of Montana and Wyoming may be impossible. He cites the National Academy of Science Study which indicates that rehabilitation potential of land receiving less than ten inches of precipitation per year is very poor. Currie says that while precipitation on the Northern Plains averages about thirteen inches a year, approximately thirty percent of this moisture is in the form of snow which evaporates rapidly. The ability of revegetated areas to endure harsh climatic conditions over a long period of time remains to be proven.

The most staggering changes facing the West may result not from stripping the land itself, but from the secondary effects of mining. Foremost among these will be the changes in water use patterns that the large scale developments will cause. The Montana Coal Task Force says, "Water controls all activity in the semi-arid region."

The Northern Cheyenne and Crow Tribes should be concerned that they don't end up like the Navajo Tribe. It has already assigned two-thirds of its Colorado River Allotment to coal development corporations, eliminating the possible future use of that water for irrigation. There is no doubt that there is simply not enough water in the western states to permit the enormous congregations of coal-fired generating gasification, and liquification plants envisioned in recent years by utility and oil companies. Unlike water used for irrigation or industrial cooling, this water used for coal development gasification plants, liquification plants, and so forth, will be lost to the western ecosystem permanently, further drying out an already arid land. Since the coal industry has been busy buying up water rights in order to insure coal development, the Crow and Northern Cheyenne Tribes can be sure that they will be approached to surrender some of their water rights in order to assure coal development. The Tribes should be extremely cautious in transactions concerning relinquishment of water rights for coal development. To do otherwise would be to lock themselves into a coal based economy and find themselves at the mercy of the coal industry.

If the Crow and Northern Cheyenne have not so provided for in their contracts they should insert a land use regulation requiring that the top soil be put aside from the stripping overburden. This should be done because strip-mining disrupts the chemical composition of the ground. Much of the soil of the Northern Plains and the Southwest is high in alkaline salts. Normally, the salts are leached out of the upper soil layers. The deeper the soil the higher the concentration of salts, so the vegetation grows near the surface in the least alkaline soil. Stripping mixes the surface and deep soil together, resulting in a uniform salt concentration that is too high for most vegetation to withstand. If the upper soil layers are set aside, there is a slightly better chance reclamation can be achieved.

The following remarks are taken from an article which appeared in "Coal Age," November 1974 entitled "Reclamation Factors to Keep in Mind When Planning a Surface Mine Operation". "Before mining begins is an excellent time to plan for removal of overburden in a way that will do the least damage to the site and to the surrounding area," notes Frank W. Glover, Jr., Assistant State Resource Conservationist, Soil Conservation Service, U.S. Department of Agriculture. Prior to mining is an excellent time to consider future use of the area. For example, what is the possibility of using the area for pasture land. Christmas tree production, timberland, improved wildlife habitat, or recreation areas of other kinds?

"The need for pre-planning prior to applying for a permit (it should be noted that this article is directed mainly toward the mining industry) is to determine whether an area, once disturbed, can be stabilized. If it is determined that satisfactory stabilization is possible (and a decision is made to go ahead with the mining), then the objectives of pre-planning are control of off-site erosion, effective silt control, proper spoil placement as determined by the physical and chemical characteristics of the site, and the establishment of a protective vegetative cover over the disturbed mine area."

The following remarks are of a more technical nature and should be considered carefully by tribal members who have the expertise to evaluate the mining industry representations in this regard. It should also be noted that these remarks were most likely directed towards West Virginia mining and may not be particularly applicable to the Crow and Northern Cheyenne situation; however, the general tenor of the remarks should still hold true.

"The characteristics of the overburden to be recorded should include slope, ph factor, and stoniness. Each site will be unique with respect to pyritic materials, acid sandstone, strike and depth of coal, and slope stability. The chemical nature of the spoil material may require more careful stacking during mining. Where this material is highly acid or has potential to produce acid, positive identification should be made with some decision on what will be done with it. Burying of the material may be the only way to provide surface material favorable to plant growth. Where acid material is only moderately acid producing, perhaps soil amendments such as agricultural limestone may be used with satisfactory results. Access roads shown on the proposal maps available for pre-inspection should be checked for grade and drainage requirements. How the road can be maintained during mining and left alone after mining, or other important aspects of access road location.

"During pre-planning, the natural drainage pattern is a vital consideration. The active area should drain into a natural water course. Problems with this are: how much additional water will the waterway have to carry? Will the additional water cause erosion in the waterway? Can this erosion be controlled? At the same time, provisions for the control of sediment need to be considered. Possible impoundment sites need to be located, and decisions made about construction. After this some design information about the impoundment site is a part of the pre-plan. This includes size of drainage area above the impoundment with some calculations of storage capacity based on erosion rate.

"During pre-planning, the crop line and extended disturbed area as estimated on the proposal map should be studied. If timber includes merchantible products, decisions must be made so that this harvest can be followed through before mining.

"Finally, plans should include maximum use of vegetation to aid in control of off-site damages. This includes vegetative treatment for access roads very early in the mining operation. Laws generally require seeding on cuts and fills on all haulage ways during the first growing season after they are built. Seeding and mulching on any area where there will be no further disturbance and on areas that will not be used for thirty days or longer should not be considered. The species used depend on future land use, the characteristics of the area (ph, slope, and stoniness), the time of year, and how long vegetation must be effected. Hence, fertilizer, seed tillage and mulching are all considered during the planning. Mechanical measures to reduce effective length of slope and to supplement subsequent vegetative practices should be considered."

Thus, pre-planning involves locating access roads, deciding on major waterways, choosing the measures required to control sediment, and determining proper spoil placement. The pre-plan should include plans for establishing vegetation on all disturbed areas as soon as possible. The following article is taken from Scientific American, December 1975 issued entitled "The Strip-Mining of Western Coal" by Genevieve Atwood. This article examines the possibilities of reclamation after the coal has been mined.

"On the Northern Great Plains rainfall ranges between 12 and 16 inches per year; the terrain is gently rolling; the overburden consists of alkaline shales and sandstones, and most of the land is grazed. Reclamation can be successful at most of these sites with enough planning, management, money and time put into it.

"The prerequisites to successful reclamation include stability of the site, a non-toxic soil medium capable of holding moisture, proper plant seeding techniques (which generally require slopes that can be traversed by farm machinery), occasional supplementary water and adequate management of grazing animals.

"Strip-mining usually buries top soil under subsurface unconsolidated material. Natural processes will not soon regenerate such soils. Although certain soil characteristics can be artificially created, some mine operators have found it cheaper simply to segregate the top soil during mining operations. Then when the coal has been removed and other overburden has been put back, the original top soil can be spread over it. In a semi-arid area reclamation is virtually impossible unless the ground is covered with non-toxic material capable of holding water.

"The changes in surface material brought about by strip-mining may result in changes in vegetation that are in themselves detrimental to the productive capacity of the land. Even in relatively non-productive regions the impact can be heavy. For example, halogeton, a toxic weed, is among the first and most tenacious plants to revegetate disturbed desert land, to the dismay of ranchers. In more productive areas much can be done to restore or even enhance the productivity of mined areas by irrigating them. That, however, calls for a long term commitment to land management that many mining companies are unwilling to make.

"Water, in fact, is the key to reclamation in the West. Mined areas unlike those in the Appalachians cannot be regarded as having been reclaimed when they have been simply reshaped and revegetated. Their hydrologic function must also be restored. In areas where productive activities, such as ranching, depend on a barely adequate supply of water, any disturbance of that supply can be critical.

"The hydrologic measures normally taken after mining can usually reduce such surface water problems as erosion, sedimentation, silting, ponding and changes in the quality of water. A variety of techniques for handling material, impounding water and treating water (developed at Appalachian and Middle Western mines and a strip-mine in Washington) can be applied in Western mines. After mining, surface water usually infiltrates the spoil material rapidly, which tends to promote revegetation in the recharge of aquifers. If a soil material has not been successfully established over the spoil, however, a layer of hardpan can form. Then the surface runoff increases quite likely giving rise to undercutting and the erosion gullies downstream. Such effects are almost always irreversible. They're similar to the widespread damage to streambeds caused at the turn of the century by the excessive runoff brought on by overgrazing.

"Changes is the quality of the surface water caused by the mining operation can be controlled by treatment at the site. Subtler and more serious are the consequences of leeching and the mechanical erosion of the highly alkaline overburden. An excess of dissolved salts, a high content of trace metals and an increased load of sediment are the commonest symptoms.

"Ground water can also be contaminated by the percolation of water through the spoil, the residue of chemicals used in the mining process, the mixing of the ground water layers during the mining cycle and the seepage of low quality ground water from one stratum to another. Effects of this kind, which are difficult to prevent and almost impossible to reverse, may not be detected for decades. The ground water at Colstrip, Montana, is only now being found to have been contaminated by mining operations of fifty years ago.

"Pumping water out of a mine so that the mining of itself can proceed often gives rise to another set of problems. The water table in the vicinity of the mine is drawn down and thereby lowers the water level in nearby wells. In Gillette, Wyoming, for example, it is estimated that intensive mining could result in the lowering or dewatering of some 200 wells used for livestock.

"Mining may also change the characteristics of aquifers. It is almost axiomatic that mining alters the porosity and permeability of the overburden. On the Northern Great Plains the most valuable aquifer may be the coal seam itself, and the overburden may also be an aquifer. In addition water of poor quality may be contained in pockets in the overburden and in the strata just below the coal. By disturbing these components of the aquifer and by introducing their contents into the rest of the aquifer, mining can lower the quality of water in it.

"The problem of maintaining the aquifers is even more difficult when mining is done on alluvial valley floor, which is by definition an area of unconsolidated overburden and a high water table. In the West such areas act as buffers to the seasonal fluctuations of surface water and provide the naturally irrigated land where winter hay is grown for cattle. Where surface mining interrupts the alluvial aquifer and reduces the amount of water in it, the surface water table downstream is lowered and vegetation with short roots is desiccated. Without its protective cover of vegetation the unconsolidated material of the valley rapidly erodes, downstream areas are undercut and gouged and the productivity of the area can be lost for decades.

"If the essential hydrologic functions of the alluvial areas could be maintained during mining and restored after mining, there would be no reason not to mine them, particularly since the handling of overburden tends to be cheaper in such areas than it is in the hillier country around them. It is by no means certain, however, that the hydrologic function can be maintained during mining. Until reliable methods of doing so are devised, surface mining will inevitably endanger the long term productivity of an area for a cash crop of coal that can be harvested only once."

CONTROL OF TRIBAL RESOURCES

The Social Impact—part 2

Development of the coal resources along the lines suggested by the North Central Power study might be expected to bring in between 500,000 to 1,000,000 people in the tri-state area of Montana, Wyoming and North Dakota. This could be expected to increase population in this region five-fold. Between 200,000 and 400,000 people are expected to migrate into eastern Montana. The Bureau of Reclamation predicts the coal development in the Northern Plains could result in the "sevenfold increase in the present population." This influx will result in new industrial towns. These towns in turn will demand services from the county and state. The quality of life, as well as the environment, would change drastically. The ten thousand megawatt power plants proposed for the Colstrip/Gillette area are actually built, not to mention an unspecified number of coal gasification plants.

The consequences for residents of this area could be lethal. Even with the best available technology the amount of particulate matter and dangerous trace elements which the plants would emit could constitute a serious health hazard for all those living in the area.

Obviously this growth will provide increased income and a larger tax base for Western communities, but it will overstrain public facilities and services. Hundreds of miles of highways must be built and dozens of schools, hospitals and sewage treatment facilities must be provided. Government services, including police and fire protection and garbage collection, must expand to meet the demand. All of this must come in a hurry because, in terms of urban planning time tables development will happen overnight.

The specter of boom-bust economics weighs heavily on the west. The region must equip itself to deal with changes that could be as temporary as they are rapid. The average coal mine produces for about thirty-five years. Power and gasification plants last the same length of time. When the coal is gone, the mining and the related industries move on to new supplies of coal, taking much of the economic life and the tax base of the comunity with them. Congressman Ken Hechler (D, West Virginia), says, "Strip-mining is like taking seven or eight stiff drinks. You are riding high as long as the coal lasts, but the hangover comes when the coal is gone and the jobs are gone and the bitter truth of the morning after leaves a barren landscape and a mouthful of ashes."

The West is no stranger to the boom-bust economics of mining, but the extent of strip-mine coal development will be unprecedented. Westerners are afraid that their homeland will become another Appalachia. If reclamation is not successful, the region's cultural base will be permanently destroyed, and the people will not be able to pick up the remnants of their old lifestyle. The Northern Plains Resource Council asks, "Will we have at the end (of thirty-five years) a series of dying and ghostly towns spread across the prairie, and Indian communities submerged in a white mining culture, and a marginally productive agricultural community ?"

The problem of growth could be even larger than that simply of mining. Satellite industries may accompany the energy boom. These secondary industries could feed on by-products of the single coal gasification plant such as tar, naptha, phenol and ammonia. A single plant could induce secondary employment ranging from 280 to 360 workers.

That would mean a secondary population increase from 1,300 to 1,600 people. Those are just the so-called permanent residents. The construction phase of the aforesaid gasification plan could bring in 5,000 workers. All of these people need services provided by the city such as roads, schools, health facilities and so forth, but they contribute minimally to the tax base.

In Douglas, Wyoming most of the people moving into that town are living in mobile homes. The 1970 population of 2,600 has swelled to 4,600 according to a utility company's figures. With all that growth, Douglas is not receiving much tax revenues. The town's assessed valuation has increased by only a half million dollars. Douglas residents are the most highly taxed in the state. The Douglas experience merely illustrates the urban planners' fear that the tax base will not be able to expand quickly enough to generate the capital needed to expand public services such as police protection.

On the other hand, local merchants such as Mayor Gene Tuma of Forsythe boast, "We've got a new feed store just started, a new Ford dealer, a new machinery shop, new trailer courts. It is an expanding situation. The economic situation is really great. "Mayor Tuma is also the reclamation supervisor for

Peabody's Western Division. It may well be that he is unconcerned with the economic realities of the situation."

A 1973 article in the "Survey of Current Business" notes that local economies most dependent on heavy manufacturing and mining, especially coal mining, are the most sensitive to business cycles such as recessions. The Northern Plains area has suffered comparatively little from business fluctuations since World War II—without energy development. Personal income has been "very well maintained" during all four recessionary periods since 1948, the article states. The article by Robert B. Bretzfelder, introduces a measure of sensitivity to business cycles called "cyclical swing." Cyclical swing measures the difference in the rate of growth of non-farm personal income during recessionary and expansionary periods. That difference reflects the stabilities of an area's economy. The economy of Wyoming has been less affected by recessions than the economics of forty-four other states. Cyclical swing in West Virginia—which has the largest coal mining employment of any state—was three times that in Wyoming. Cyclical swing in Pennsylvania, where both heavy industry and coal are important, was three and one-third times that in Wyoming. Both Montana and North Dakota show even less cyclical swing than Wyoming. Montana's swing was one-twelfth that of West Virginia's.

The roller coaster ride of industrial economics may not be far off either in time or in place for the members of the Crow and Northern Cheyenne Reservations. If Colstrip units three and four are built, two transmission lines would come through the Sarpy district to Hardin, Montana.

This region will become then one of the principal new coal based industrial centers in the Northern Plains, with a city of perhaps 25,000 people. Some of these people are arriving already. Colstrip, Montana, home of large Western Energy and Peabody Strip-Mines, has grown from 150 to 700 people in two years. The population is expected to reach 1,800 in the next few years. The nearby town of Forsythe, a metropolis by current standards, has grown from 2,000 to 2,700 since 1971. It is probable that in the next quarter century, several cities of 100,000 people will spring up in the Northern Plains in the wake of massive coal development.

At a meeting of the Federation of Rocky Mountain States in East Glacier, Montana, government and business leaders took a look at what has already happened in several impacted areas. Information now available from such nearby centers as Rock Springs and Gillette, Wyoming and Colstrip, Montana, was used to portray the modern version of the "boom-town." Resource City was the hypothetical result.

Resource City is an area of burgeoning populations, unplanned and uncontrolled growth, intolerable living conditions, social instability leading to high crime rates and a cancerous growth rate of mental illness and a landscape which no longer holds beauty and attraction. Such a situation is not exaggerated, the conditions described do exist and will exist in many sections of the coal development region.

A report of the Northern Great Plains Resource Program (NGPRP) says that 35 percent of the housing units in Gillette were mobile homes in 1973, and "the number is rapidly increasing." In Resource City housing is almost impossible to find.

Tents are common. More than 35 percent of the population lives in house trailers. (Some of these are nothing more than recreational campers.) The setting for the trailer cities are barren, open, windswept areas, plagued by either mud or swirling dust. There, trailer rentals may cost up to eighty-five dollars per week. Motel rooms in the town proper are rented in eight hour shifts. Job turnover is high because of living conditions and the high crime rate of 400 percent. The kids come and go through the crowded classrooms. The welfare roles have quadrupled.

Traffic in Resource City has increased fivefold leading to further problems for an understaffed police force. Some workers commute 70 miles and more. If workers want to take their families to a good hospital and to doctors who are not overworked, they go 150 miles or more. Long lines develop and there is a three hour wait at the hospital emergency room. Divorce rates are far beyond the regional rate and child abuse is more prevalent. There is a 1,000 percent increase in the caseload at the mental health clinic. There are no adequate recreational facilities. Local bars flourish. The local jail is a haven for wives seeking protection from the beatings of drunken husbands. The jail also holds alcoholics and psychiatric patients.

Hunting and fishing which was once one of the important pastimes around Resource City has virtually disappeared. Vandalism of private property and scenic and historic sites is greatly increased. Clean air and wide open spaces have disappeared along with the game animals. So has the tourist industry. There is much more that could be told about the effects on local businesses, on tax rolls, on land use, and on the myriad of other aspects of massive energy developments.

But what will the social impact be on existing residents? (While the following remarks are directed towards ranchers they are equally analogous to resident Indian populations.) A Montana sociologist studying Colstrip, Montana and Gillette, Wyoming has found less of a tie to the land among Wyoming ranchers than among their counterparts in Montana. (In the Crow and Northern Cheyenne situation the Crow being more development oriented might be more analagous to the Wyoming ranchers and the Northern Cheyenne likewise analagous to the Montana ranchers).

The sociologist, Raymond L. Gold, of the University of Montana, said that although both regions have similar histories of ranching development "Wyoming ranchers identify with big business much more than Montana ones do. . . . Ranchers in Montana tend to act in opposition to coal development. The ranchers in Wyoming tend to act so as to accommodate or acquiesce or capitulate to coal development."

In a report entitled "Social Impacts of Coal Related Development in Southeastern Montana," Gold describes some of the recent social effects of coal development in the Colstrip region. During six months of research there, his research team noted:

"Strains in communicating with friends and neighbors of long standing,

"The making of social class alignments previously considered unimportant,

"A shift in the established power structure from the ranchers to the new mining industrialists,

"The need to live with constant and increased uncertainties for which planning is virtually impossible,

"A keen interest on the part of some merchants and businessmen in immediate monetary gain,

"The need to accommodate to the invasion and requirements of newcomers who subscribe to foreign lifestyles and value systems,

"And loss of a sense of community."

"Ranchers who for the most part view the corporations as amoral, cold-blooded, and motivated more by profit than anything else, are at a great disadvantage in dealing with the companies," Gold says. The companies have "better information, trained and experienced staffs, and an operational ethics suited to treating land owners as exploitable natives." Companies reportedly take advantage of the ranchers traditional quiet independence. Divide and conquer tactics and pincer movements can be effectively used against the ranchers, Gold says.

"The traditional readiness of rural neighbors to get together to fight off destructive forces has been replaced by a modern rural inclination for the individual land owner not to get involved personally and directly in his own social salvation until it becomes desperately clear that any other course is almost certain to do him in." Gold says.[34]

Some Indians may view coal development as their only opportunity to escape the economic depression which has plagued them since the white man came. The average family income for an Indian reservation amounts to three thousand dollars per year. The Northern Cheyenne expect to net over three hundred million dollars in royalties for their coal over the next quarter century, which works out of $116,000.00 for each Indian on the reservation.

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[34] Gold's report is available from the Institute for Social Science Research at the University of Montana in Missoula, Montana 59801.

However, the Cheyenne have developed a cautious approach and are disputing the proposed additions to Colstrip. On the other hand, proving the effectiveness of the divisive principle, the Crow are not objecting to Colstrip in order to reap some of the coal bonanza. While the Crow have been successful in renegotiating their leases for higher prices, the lease broker who negotiated the original deal, James Reiger, persuaded the Crow that they could not sell their coal unless they relinquished rights to thirty thousand acre feet of water per year (which would be needed for gasification plants). Altogether, the Crow have given the coal industry valuable options for 140,000 acre feet of water per year without remuneration.

The original leases which the Northern Cheyenne granted the coal companies gave the purchaser the right to use the Indian land for all manner of building and installations necessary for the production, processing, and transportation of the coal, opening the way for the construction of power, conversion, and petrochemical plants, railroad lines, associated industrial complexes, and new towns of non-Indians, whose number would submerge the approximately 2,500 Northern Cheyenne and turn the reservation quickly into an industrialized white man's domain.

Most members of the Tribe were uninformed about the terms of the leases, but when Peabody and AMAX exploration crews appeared, drilling among Indian burial grounds and disrupting the Indian's lives, friction and unrest developed rapidly. Fearful for the future of the reservation, their culture, and the tribe itself, a number of Indians, mostly those who held allotments formed the Northern Cheyenne Land Owners Association to oppose the coal development. Allottees, whether they be pro-development or con-development, can cause serious problems to the tribe as a whole when it develops a program for utilization of the coal resource.

The attraction of developing the coal resource must be considered to be extremely high when estimates of unemployment on the reservation range from 11.1 percent to 26 percent in a state where the rate is 5.5 percent. One solution to this problem might be to negotiate with the coal companies for jobs for any Indian who may want them. The Hopi and Navajo tribes have arranged to have 300 Indians hired at $10,000.00 per year to work in the mines. However, they have recently begun to express dissatisfaction with low level of the jobs provided. One method of dealing with this would seem to be to arrange with the coal companies for training of anyone on the reservation who would wish to do so.

The question remains whether the Crow or Northern Cheyenne can control the impact of coal development upon their reservations. One's hopes in this regard must be severely chastened by the observation that where the State of Montana is helpless before the combined onslaught of the Federal Government and the coal companies, it is hard to imagine that the Crow and Northern Cheyenne reservations will be any more successful. In a more abstract sense, it may be impossible to prepare the residents of any region for the social impact of going from a rural agrarian economy to a mining industrial economy overnight. Certain things can be done, however, such as, locating all subdivisions off the reservation and away from water.

CONTROL OF TRIBAL RESOURCES

Proposed strategies for coal development—part 3

Strategies to control coal development may be broken down into four broad categories: (1) Information gathering, (2) Land use regulations and siting, (3) Enforcement, and (4) The taxing power.

The first category, information gathering, is already well underway on the Northern Cheyenne and Crow Reservations. The Northern Cheyenne seem to be well funded with funds of $325,000.00. I have no figures as to what the funding for the Crow coal research project is.

It is of little use to conduct research on the environmental impact unless coal development is halted until after an inventory of the reservation's natural resources has been conducted. The Northern Cheyenne seem to be pursuing a responsible course of development since the development has been halted until the research inventory is completed. On the other hand, there has been continued development on the Crow Reservation during research efforts.

The ability of the research project of the Northern Cheyenne has been affirmatively demonstrated. More importantly, is the fact that the Tribe has foreclosed development until a comprehensive plan can be formulated, but a finding for the allottees in Hollowbreast may wipe out this planning scheme.

Land use planning is a priority concern of all Indian tribes today. The problems with formulating land use regulations fall into roughly three categories: (1) Policy, (2) The leases, (3) The regulations. The issues surrounding "reclamation have been discussed in Part One. The possibility that the tribes may wish to locate energy generating facilities on the reservation deserves consideration here. Montana has adopted a "utility siting act." The Crow and Northern Cheyenne may consider employing it as a model. If the tribes desire more energy generating facilities to be located upon the reservations it has the option of relaxing the provisions in the Montana act, conversely, where they desire to discourage energy generating facilities they may either prohibit them outright, or adopt more stringent provisions than the Montana act. There are two things any energy siting policy must take into account: (1) Emissions, and (2) the location of high tension lines. If tall stacks are used the emissions will be spread out over a larger area causing a more gradual degradation to a large region. If short stacks with best available technology are used a smaller area will be sacrificed but the larger area's agricultural productivity will be less likely to be damaged. Additionally, any energy generating facilities located on the reservation should require that best available sulphur dioxide scrubbing technology be employed. The Tribes should require that high tension lines be located away from all centers of people and livestock. These lines have been known to cause severe adverse health effects on living creatures within several hundred yards. It should be noted, that the Navajo have demanded $60,000.00 per mile for easements for power line rights-of-way.

The land use regulations which the Tribes formulate should avoid language such as "reclamation to the maximum extent practicable". Such regulations are not specific enough. The Tribes should reserve the power of final approval of all mining and development plans, including the power to veto development which doesn't meet tribal standards. The Tribes' land use regulations should also include a regular program of inspection and as far as energy generating facilities are concerned, emissions testing.

The Univesrity of Denver Research Institute (DRI) researchers have proposed a series of programs designed to make boom-town growth more manageable. This study examines such traditional police power tools as planning programs, zoning, building permits, subdivision controls and pollution standards. Plant site legislation and authority to locate subdivisions are also needed and are well within the Tribes' governmental powers. The DRI study is available from DRI, University of Denver, Denver, Colorado 80210.

It is not enough to simply have intelligent regulations, one must also be able to enforce them. Regulations are more easily enforceable the more specific they are. The Tribes are in a unique position because they also contract energy companies. In one respect the Tribes are able to recoup through regulation what they fail to achieve through negotiation. However, this does not obviate the need to make the leases as specific as possible, especially on reclamation issues and emissions control. The regulations should speak to results and the contract should speak to methods of achieving those results. In order for the Tribes to enforce these regulations they will need either to employ independent experts or to train tribal members to take over the enforcement responsibilities. A combination of the two is also possible. Any enforcement program should include a regular inspection and emissions testing component. The company should be given a brief time to comply. In the event of non-compliance there should be a summary proceeding before the tribal governing body with the authority to cease operations in the event it finds non-compliance.

The Crow Tribe's recent decisions to assess a 25 percent business license fee on coal produced on their reservation or from the Sarpy Creek mine in the Crow ceded strip raises new possibilities in the "lease v. negotiation." Westmoreland Resources, operator of the mine in Sarpy Creek, already pays thirty percent severence tax under state law. There is no doubt that the Crow tribe is trying to wrest control away from the state, its tax is five percent lower. The effect of this tax will be to encourage coal companies to locate their mines on the Crow Reservation. If the decision to develop has previously been made, then there are a number of taxing strategies which the tribe might pursue: (1) A severance tax tied to the wholesale price index—a base of 50 cents per ton for coal produced at mine mouth rises one cent for each three cent rise in the wholesale price today, (2) A coal conversion privilege tax—for every thousand cubic feet of synthetic natural gas produced there is an assessed tax of ten cents or simply two and one-half percent of the value of the gas per sale, (3) Electric generating plants can be charged on the basis of 25/100 mil per each kilowatt, (4) Fertilizer or plastics plants can be charged two and one-half percent of gross receipts.[illegible]

Comments

When speaking of the Crow and the Northern Cheyenne it must be noted that while the reservations are located adjacent to one another, the Tribes themselves pursue dissimilar attitudes toward coal development. The Northern Cheyenne are on a smaller reservation located in the middle of the proposed energy generating facilities while the Crow have a larger reservation somewhat away from the impact area. The Crow are already actively developing their coal resource whereas the Northern Cheyenne have adopted a policy of research before development.

The above has its effect on how the Tribes are viewed by the State of Montana, Federal agencies, coal industry, ranchers and assorted environmentalists. The State of Montana has adopted an export only philosophy and can be expected to support tribal decisions along this line. The Tribes can expect serious opposition from the State if they contemplate entry into the energy generating business. An example of this is the Colstrip hearings in Colstrip, Montana. The Northern Cheyenne are participating in opposition to the additional generating facilities. The Crow have decided to withhold their participation.

Federal agencies (i.e., Bureau of Indian Affairs, and Bureau of Land Management) seem to have adopted a strong energy development posture. The Bureau of Indian Affairs was one of the first agencies to sell out the Indians in the coal controversy and should not be counted on for any support or knowledge. The Bureau of Land Management is strongly energy oriented and should not be counted on for any support, as well. On the other hand, the United States Geological Survey has conducted some mapping of the geologic resources in the area and might be a good information resource.

As long as the coal industry is allowed to mine the coal, it is probably amenable to renegotiating contracts. However, if the Tribes pursue a moratorium on mining then they must expect legal battles.

Ranchers and environmentalists on the one hand are opposed to any mining of the coal resource as a principle. This would put them in basic opposition to any tribal stance in favor of natural resource development. In Montana, ranchers have an extremely powerful voice in the state house.

In the current situation, the Northern Cheyenne assume a most vulnerable position. The decision in the *Hollowbreast* case may obviate all discussions as to tribal strategy to develop coal resources if the Supreme Court comes down in favor of the allottees. It would make it virtually impossible for the Tribe to exert any meaningful control over the coal industry.

GOVERNMENTAL POWERS OF INDIAN TRIBES

Substantial authority exists in case law for the proposition that Indian tribes possess the power to assert governmental authority within the exterior boundaries of their reservations.[illegible] The variable lies in the fact that federal courts, in-

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[illegible] For more technical papers on reclamation, social impacts, environmental impacts and related subjects dealing with coal development in the Northern Great Plains, a copy of the proceedings of the Fort Union Coal Field Symposium held in Billings, Montana in April 1975, may be obtained from the Coal Symposium, Bookstore, Eastern Montana College, Billings, Montana 59101. Price: $8.75.

[illegible] See: *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956). *United States* v. *Mazurie*, 419 U.S. 544 (1975), *The Confederated Salish and Kootenai Tribes of the Flathead Reservation* v. *John C. Moe*, 44 LW 4536.

cluding the Supreme Court, tend to bandy about the extent of that governmental authority. The frightening consideration is the possibility that an act of Congress can at any time modify or even eliminate the weaponry housed in case law for tribal governmental power. The "Termination Era" of the 1950's is a prime example of how lethal the legislative process can be for Indian people when Congress is of the mood to legislate them away.

The coal development issues confronting the Crow and Northern Cheyenne Tribes serve as a definite illustration of just how crucial it is that Congress take affirmative steps to protect the governmental authority of Indian tribes within the exterior boundaries of their reservation. Furthermore, as exemplified by the coal issue addressed in this report, the non-Indian encroachment into lands and lives of Indian people make it imperative that Congress legislatively extend tribal governmental authority to include jurisdiction over non-Indians and patent fee lands within the exterior boundaries of Indian reservations.

Empirically, the federal courts have constructed a noticeable pathway to that end. It is, therefore, the fiduciary responsibility of Congress to make permanent the vital artery to full governmental authority for Indian tribes.

It should be noted that the scope of the governmental authority must be viewed onward from the source of that power. Tribal power is not derived from a specific allocation of governmental authority extended to tribes by the United States. The traditional concept of "sovereignty of independent nations" provides the basis of said power. In his "Handbook of Federal Indian Law," Felix S. Cohen described the governmental power of Indian tribes as follows:

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative powers of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its power of local self-government. (3) These powers are subject to qualifications by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government. (p. 123)

Essentially, Cohen stated that Indian tribes possess "left over" powers of sovereignty. If tribes are to be viewed as quasi-sovereign units of government then they are certain to be vested with the basic inherent powers appertinent to a sovereign state. Powers necessary for the attainment of that which is in the best interest and welfare of the governed are inherent. Governmental authority exists for the benefit of the governed.

These inherent powers are the police power of the governing entity, its power to tax and its power to judicially enforce its rules and regulations. For Indian tribes the problem lies not in a denial to recognize these powers by the United States but in the historical indifference by the United States to make genuine efforts in assisting tribes to develop and refine these powers.

As a consequence to the above, we have in the year 1976 an era of a world energy crisis, a situation wherein the Crow and the Northern Cheyenne must fumble and react to tremendous external pressures. The frenzy of the times is not an appropriate environment in which to design governmental capacity. Unfortunately, such may be the case at Crow and Northern Cheyenne in terms of long range effects.

As a practical matter, it appears that the police powers of the two tribes are being newly asserted on a comprehensive level. The keys to effective police power are the design and promulgation of the laws for the health, safety, and welfare of the people. Both tribes appear to be just now inserting these keys to unlock the door to proper governmental authority.

It seems that neither tribe has developed taxing schemes which demonstrate fully the tribal power to tax. Sovereign governments possess the power to raise revenue to defray the financial obligations for their governmental functions. Iron Crow established the proposition that Indian tribes possess the power to tax as a corollary to governmental function.

Both tribes suffer from a governmental defect which is characteristic of most Indian tribes. The administration of their judicial power is relatively weak. Much has to be done to prepare these tribal courts for the complex land use planning regulations anticipated and the intricacies of effective coal and other resource taxing schemes.

Thus, the governmental capacity of the Crow and Northern Cheyenne to deal effectively with their coal resources is a questionable issue. The burden of fault here must be shouldered by the federal government. The two tribes must be commended for their efforts to combat the vicious appetite of the coal industry.

CONCLUSION

On May 10, 1976 the Department of the Interior issued regulations to allow strip-mining of vast federal coal reserves in the Western states. "We need to double our coal production by 1985," remarked Interior Secretary Thomas Kleppe, noting that the United States is "at the mercy of foreign (oil and gas) producers who could implement another embargo at any time."

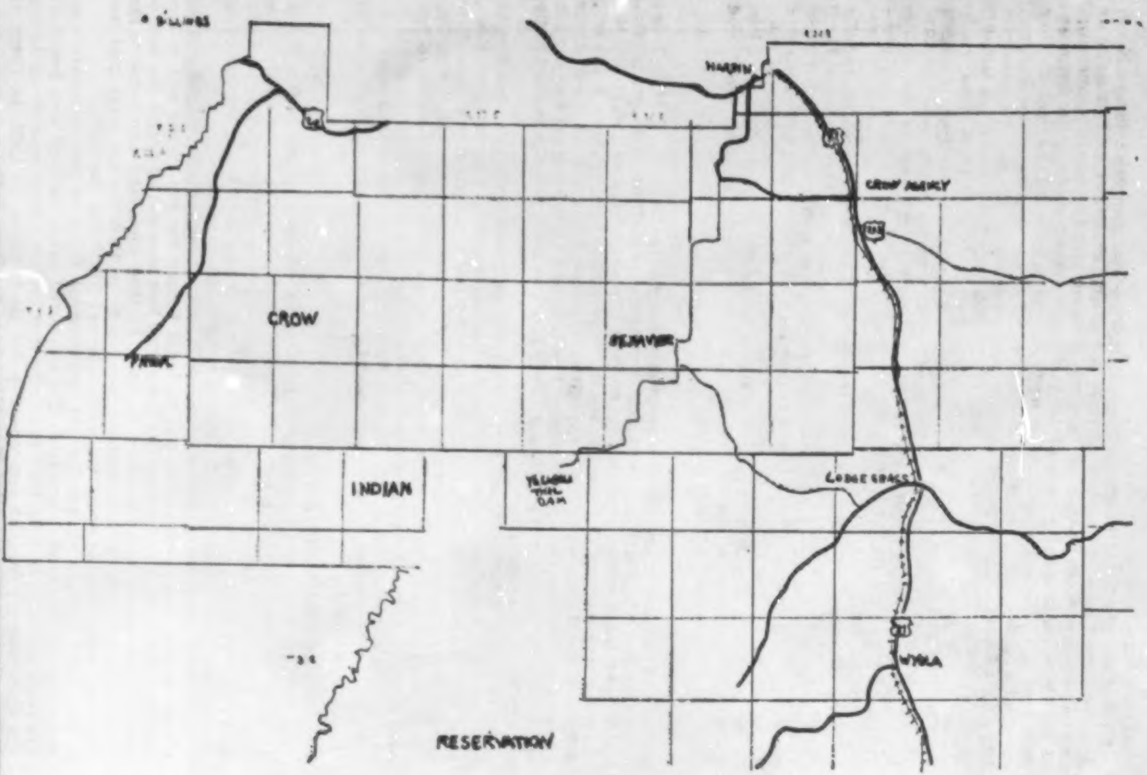
The Secretary noted that the federal coal will be mined "in an environmentally sound manner by minimizing pollution and restoring land to its approximate original contours and vegetation." The demonstration of such a feat will be none short of miraculous.

An unsuccessful fight in Congress for a federal strip-mine bill was led by Representative John Melcher (Dem.-Mont.) who said the regulations will have "a devastating effect on Western states." Melcher said the regulations do not adequately protect the underground water supply. He stated, "Water is the lifeblood of the Western states. These regulations could leave us dry. They could leave us naked."

Secretary Kleppe stated that he hopes to increase the production of federal coal (presently 32 million tons annually) to 305 million tons per year by 1985. Thus, he lifted a five year moratorium on federal coal leasing.

The Crow and the Northern Cheyenne stand in the wake of a strip-mining fever. Their governmental capacity to cope with the coal industry is tenuous. If self-determination for Indian tribes as expressed by Congress holds any substance at all then immediate steps must be taken to clarify and protect by legislation the governmental authority of the Crow and Northern Cheyenne and all Indian tribes. Without a succinct delineation of governmental authority the ability for tribes to construct and expand governmental capacity is needed. Hopefully the time has not passed for the Crow and Northern Cheyenne people.

APPENDIX A—MAP OF THE CROW RESERVATION


BILLINGS
HARDIN
CROW AGENCY
PRYOR
CROW
ST. XAVIER
INDIAN
YELLOWTAIL DAM
LODGE GRASS
WYOLA
RESERVATION

APPENDIX B.—THE CROW INDIANS

A brief outline of the history and general information prepared by Mr. Joe Medicine Crow, a member of the Crow Tribe.

Early history

Most of the northwest plains Indians originally came from northeastern North America. They were forced out of their forest and woodland habitat by more numerous and powerful tribes, perhaps the Mohawk and Iroquois. The ancestors of the Crow Indians came from a "land of many lakes", probably in the headwaters of the Mississippi or further north in the Winnepa Lake region. They eventually settled along the Missouri River in what are now the states of North and South Dakota. These people lived in semi-permanent villages of lodges covered with earth. They became known as the "people who lived in earthen lodges."

Nearly 400 years ago these people divided into two factions. One group eventually claimed most of what is now eastern Montana and northern Wyoming as their homeland. At the time of the breakup, this group numbered about 500. Its population reached about 8,000 before the smallpox epidemic of the middle 1800's. At that time the ABSAROKEE or Crow Tribe traveled in two or three groups or bands.

In the Hidatsa language, this group was called ABSAROKEE which literally means "Children of the large-beaked bird", (ABSA meaning "large-beaked bird" and ROOKEE meaning "children" or offspring). Other Indian tribes called these people the "Sharp people" meaning that they were as crafty and alert as the bird ABSA (probably the raven) for which they were named. In referring to them in the hand sign language they would simulate the flapping of bird's wings in flight. The early white men interpreted this sign to mean the bird "crow" and thus called the tribe the "Crow Indians".

Recent history

Prior to the Lewis and Clark expedition through the Crow Country in 1804–1806, very few white men had ever seen the Absarokee or Crow Indians. In 1743, the Verendryes Brothers ventured out of their Canadian frontier and visited the Crow country naming the inhabitants the "handsome men" (beaux hommes). following the Lewis and Clark expedition, various fur companies and their trappers moved into the Crow Country. Trading posts were built at the junction of Yellowstone and Big Horn Rivers (Fort Liza) in 1807, Fort Cass further up the Big Horn River and others.

By 1864, the Bozeman Trail, a well traveled emigrant trail was blazed right through the Crow Country. Shortly thereafter three military posts (Fort Reno, Fort Phil Kearny, and Fort C. F. Smith) were constructed along this trail to protect the emigrants on their way to the gold mines of western Montana. The Sioux Indians who were forced out of their Black Hills Country came to this area to continue their resistance against the white invasion and forced the Government to abandon these forts. Fort C. F. Smith was considered the most dangerous frontier outpost. It was abandoned by the army less than two years after it was established.

Relations with the United States

In 1825 the Crow Tribe and the United States signed a treaty of friendship. In 1851 the so-called Fort Laramie Treaty established the boundaries of the "Indian Country" for several tribes, including an area of 38,531,147 acres designated for the Crow Indians. This was followed by another Fort Laramie Treaty in 1868 which reduced the Crow Country to 8,000,406.20 acres.

An Act of Congress in 1882 resulted in further reduction of the land and, as compensation, the Government was to build houses for the Crows and to buy livestock for them. By this time the Tribe land had been settled within the boundaries of the reservation for about 10 years. In 1890 more land was ceded to the Government for which they received $946,000.00. In 1905 the last large land cession was made leaving about 2¼ million acres of land for the Tribe.

The Crow Indians always felt the Government failed to give adequate compensation for the land it acquired. The estimated value received was less than five cents per acre. In 1904, the Crow Tribe first initiated legal proceedings (suing the Government) for just compensation for lands taken. In 1962 the Court of Indian Claims finally awarded $10,242,984.70 to the Crow Indians.

Since 1905, further attempts were made to reduce the Crow Reservation. Senator Dixon in 1910, Senator Meyers in 1915, and Senator Walsh in 1919, all sponsored legislation in the national Congress to open the balance of the Crow Reservation for settlement by the public but all attempts failed. An Act of Congress passed on June 4, 1920, sponsored by the Tribe itself, divided the remainder of the reservation into tracts which were allotted to every enrolled member of the Tribe. The rough mountain areas were withheld from such allotment and remain in tribal ownership. The titles to these lands are held in trust by the Federal Government and allottees may not dispose of their lands without the consent and approval of the Government.

Pattern of Absarokee culture—Past, transitional, and present

The Absarokee Tribe evolved through several stages of cultural development. The early ancestors who lived in the eastern forests practicel agriculture and achieved a fairly high level of civilization. As they were pushed and forced westward into the wilderness, they gradually became more and more dependent on the hunt. By the time of their settlement in the west, their agricultural pursuits were limited to the planting of corn and squash.

Soon after their separation from the main Tribe, the Absarokee abandoned agricultural ways and became a nomadic people. They were always on the move after game and in constant warfare with other tribes of the plains and mountains. This manner of living came to an end in 1878 when reservation life began.

Social organization

The family was the primary unit of social organization and what may be regarded as a secondary unit was the clan. A clan is composed of distantly related families with membership determined through the mother.

Manner of dress

The Crow Indians, prior to contact with white men, wore clothes of tanned deer, elk, antelope, and buffalo skins both for everyday and dress wear. Dress clothes, worn in dances and ceremonials, were decorated with various ornaments of feathers, seeds, skins of small animals, and shells. Brightly dyed porcupine quills were embroidered into the buckskin clothes.

During the hot summer weather men generally wore only breechcloths and moccasins while women and girls wore full dresses at all times. The exposure of any part of the body, excepting hands and face, was considered indecent.

Today the Crow Indians wear old style costumes only at dances and ceremonials and special appearances for the general public. For everyday clothes, they wear typical non-Indian clothes. Very few old men wear moccasins and long braids. Most of the older women still wear their hair in long braids, wear moccasins, and use shawls or blankets (Pendleton) and bright mufflers on their heads. The school girls never wear "Indian" clothes, except on special occasions.

Camp activities—recreation, sports, socials

During periods of respite from the demands of hunt and warfare, the old time Absarokee camp was full of festivities such as dances, ceremonials, feasts, games for all ages, and athletic sports and events for all. The rigors of nomadic life made these people naturally athletic and they enjoyed sports and games. The boys, however, were subjected to vigorous training in running, swimming, wrestling, archery, tracking, hunting, riding, and other skills. The girls received training in "home economics".

The Crow children, of course, now attend the public schools for their training and education with their tuition paid to the school districts by the Federal Government in accordance with old treaty stipulations. There are three public high schools which Crow children attend, at Hardin, Lodge Grass, and Edgar, Montana. The Indian boys are generally good athletes and take active parts in the athletic programs of these schools.

Population trends

The small pox scourges of mid 1800's decimated the population from nearly 8,000 to less than 2,000 by 1870. The sudden change from their accustomed life in the open to sedentary life on the reservation proved unhealthy. Tuberculosis and other modern and foreign diseases for which they had little natural resistance kept the population static. Only in the last 30 years has the population increased. The population has steadily increased from 2,828 in 1938 to 2,424 in 1943 to 3,235 in 1953 to 5,127 in December, 1968.

The many and frequent instances of Indian women marrying trappers, traders, and settlers in the early years, reduced the full blood strain of the Tribe to about 25 percent of the population by the time of the first World War. In recent years the number of "full bloods" has increased.

Language

Indian languages, like all other languages of the world, have been studied and classified into various types of linquistic stocks. The Absarokee language has been classified as a member of the Siouan stock. It is comparable in style and form to the language of the Sioux and Hidatsa but very different to the language of the Flathead and Shoehone, each representing a different linguistic stock.

In the old days, the tribes of the northwest plains, while speaking different languages and dialects, were able to communicate with one another through the use of a common style of hand signs. Contrary to general opinion, not all Indian tribes were able to use this method of communication.

Many Indian languages have been studied and recorded but no exhaustive study of the Crow language has been made. Dr. Robert H. Lowie, formerly of the University of California, made a limited study in 1912 and has published a brief pamphlet on this language. The Wycliffe Institute of Bible Translation is now making a complete study of the language. The purpose is to translate the Bible into a written Crow language.

Physical appearance

The old time plains Indians always on the hunt and warpath, first on foot and later on horseback, were athletic in build, generally lean and tall. The Crow Indian is of this type and was distinguished from other tribes by the style of his hair dressing. He wore long braids and high pompadours.

In 1825, a scholarly white man measured many Crow men and found the average height to be around six feet. The women were quite short and stockily built. The present Crows appear to be heavier built, but still tall.

APPENDIX C.—CONSTITUTION AND BYLAWS OF THE CROW TRIBAL COUNCIL

Preamble

The Crow Tribe of Indians, in an effort to enforce the respect of their basic human, constitutional and treaty rights, do hereby reestablish the Crow Tribal Council to represent, act and speak for the Crow Tribe in any and all tribal matters, and to promote the general welfare of the Crow Tribe, do adopt the following constitution and bylaws for the conduct of Crow Tribal matters in conjunction with the lawful right of the Bureau of Indian Affairs to conduct same.

Article I

The Crow Tribal Council shall be composed of the entire membership of the Crow Tribe.

Article II

The council shall elect every two (2) years in conformity to its rules of procedure, a Chairman, Vice-Chairman, Secretary and Vice-Secretary. The Chairman shall have no vote unless there be a vote before the council. The election for these officers shall be held the second Saturday of May every other year after May 12, then the first election shall be held under this constitutional change. Officials are to assume their duties July 1, after election.

Article III

Any duly enrolled member of the Crow Tribe, except as herein provided, shall be entitled to engage in the deliberations and voting of the council, provided the females are 18 years old and the males 21 years.

Article IV

All nominations for officers of the council and any other tribal matter before the council shall be by voice, standing, hand-raising or secret ballot, as the council shall elect at each of its meetings.

Article V

The Crow Tribe, through its tribal council, reserves unto itself the right to remove for cause any officer of the council, for misconduct or negligence or nondiligence in connection with the prosecution of the rights of the Crow Tribe in its relations with the Bureau of Indian Affairs or the local employees.

Article VI

The Powers, Duties, and Functions of the Council:

1. The council shall establish its own rules of procedure.

2. Meetings. There shall be regular tribal council meetings held each year on the second Saturday of January, the second Saturday of April, the second Saturday of July, and the second Saturday of October, and as many additional meetings shall be held as tribal business may require. All meetings shall be called by the Chairman and the Committee.

3. Notice of meetings and agendas. It shall be the duty of the Secretary, or in his absence, the Vice-Secretary of the Crow Tribal Council to give notice of all tribal council meetings of the Crow Tribe in writing for a period of at least seven days prior to each meeting date. Notices shall be posted at one public place in each district of the reservation, and at the Agency Headquarters, and, where possible, in the local newspapers and by radio broadcast. Notices in addition to the date, time and place of the meeting, shall list in numerical order the business to come before the tribal council meeting. No business shall be transacted at the meeting unless it has been included in the public notice. Copies of proposed resolutions or other business to be considered shall be furnished to the elected district representatives by the Tribal Secretary seven (7) days prior to meeting dates.

4. Items of business. Agenda of the tribal council meeting shall include all items required by the (1) Tribal Chairman and committee, (2) Superintendent of the Crow Agency, and (3) any petition duly signed by 100 qualified voters. All requests to the Chairman and committee for a general council meeting shall be in writing and shall clearly state the nature of the business to be presented before the general council.

5. If the Commissioner of Indian Affairs desires to present any matter to the council for its action, such request shall be presented in writing to the Chairman or the committee, who shall as herein provided, advertise such request as provided, and set the date for the council sessions.

6. Except where otherwise specified in this constitution and bylaws, decisions of the council shall be by a simple majority of the vote cast.

7. The council shall perform the duties assigned to it under this constitution and bylaws and shall hvae such powers in addition to those expressly conferred on it thereunder as may be necessary to achieve its effective operation and to realize its objective.

8. All matters presented and coming before the Crow Tribal Council to be voted upon by the members of the Crow Tribe shall be decided and determined by a simple majority vote.

9. There shall be a committee composed of two (2) members from each of the Six Districts of the Crow Reservation and two (2) members from off-the-reservation Indians elected for a term of two (2) years, in accordance with the tribal council's rules of procedure, to act as an executive committee to work with the officers under the general direction of the council. The first election of these committee members shall be held within 30 days from and after adoption of this constitutional amendment, and all subsequent elections to be held the second Saturday of the month of May at 2-year intervals on alternate years from the tribal officials election. Each district shall select its own election judges from within said district whose expenses shall be paid from tribal funds. The results of such elections shall be final and conclusive.

10. The Crow Tribe, through the Crow Tribal Council, shall have the power to levy, assess and collect taxes and license fees upon non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior.

Article VII

Status and Functions of the Council:

1. The Crow Tribal Council is the voice of the Crow Tribe.

2. The Crow Tribal Council is the medium, the body, the tribal organization through which the Crow Tribe speaks to the government and the general public.

3. The Council, representing the entire Crow Tribe, shall voice the opinions, wishes, sentiment, hopes and decisions in any and all tribal matters for the Crow people to the Congress and the Interior Department, by resolutions and through tribally elected delegates who shall, under instructions of the council, proceed to Washington or elsewhere to present in person such decisions and their own arguments and appeals in support thereof as the council shall direct by majority vote.

4. Subject to existing federal law which endows the Congress with plenary powers over the Indians in their tribal state, and which in turn passes such authorities down the line to the Secretary of Interior and the Commissioner of Indian Affairs, who by regulations based upon acts of the Congress, control the management of Indian Affairs subject to constitutional limitations. The Crow Tribal Council, without legal status as such, but being the mouthpiece and the voice of the Crow people, will from time to time call to the attention of the Congress its views and wishes with respect to the administration of its rights, property and affairs by the Bureau of Indian Affairs.

5. Because of existing law governing Indian administration by the Congress herein pointed out the Crow Council admits its limited authority in the administration of its own tribal matters, but also, understanding the constitutional limitations of the government in this same field, the Crow Tribal Council will sponsor all legislation with state, federal and local governments on behalf of the Crow Tribe, and will through tribal council resolutions and elected delegates and representatives, consult with and otherwise deal with representatives of the department of the government of the United States on all matters affecting the interests of the Crow Tribe.

6. The Crow Tribal Council, which encompasses the entire membership of the Crow Tribe, so far as the Crow people are concerned, shall be supreme in determining by a majority vote of those attending, any course of action taken which is designed to protect Crow tribal interests.

7. The American system of "majority rule" used in the Congress of the United States shall prevail in the decisions of the Crow Tribal Council in regularly called and duly assembled conventions, and its majority decisions shall be conclusive and binding over the losing minority.

8. The Bureau of Indian Affairs, being a part of the United States Government, shall in no way interfere directly or indirectly through its field representatives or agents with the deliberations or decisions of the Crow Tribal Council. The council, existing under the legal handicaps herein pointed out, belongs to the Crow Tribe only, and not the government, and as such will make its decisions without Indian Bureau interference or advice, inasmuch as the Indian Bureau, under the broad powers in Indian administration conferred upon the Congress and the Indian department by both the Congress and the courts, can and does nullify Indian tribal council actions the country over when same takes issue with its own views. However, the Crow Tribal Council, regardless of same, hereby reserved unto itself the right to initiate moves looking to the protection of the Crow tribal rights and interests under their treaties and under the American Constitution guaranteeing all basic human rights to all who live under the American flag, and to the equal protection of the laws of our country.

9. The Crow Tribal Council in a duly called session will decide the manner of voting, whether by districts or in the council itself or whether by secret ballots in the districts or in the council, and on this issue the local Indian Bureau representatives will have no voice whatsoever—the council reserves this right unto itself.

10. Every member of the Crow Tribe, outside of the exception herein provided for, shall have equal opportunities to discuss any and every question of tribal concern before the council, and to participate, without interference, in all votes taken upon any such questions.

Article VIII

Section I.—This Constitution and Bylaws shall be amended by a majority vote of the qualified voters of the Crow Tribe voting at an election called for that purpose by the tribal council, provided that no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs or his authorized representative.

Section II.—All eligible tribal members may vote at such duly called elections. The enactment of rules and procedure for conducting such an election shall be the responsibility of the tribal council. The tribal council shall enact an election ordinance. And, be it further

Resolved, That the above listed changes are those which the tribal council wishes to make in the present Crow Tribal Constitution and shall do so regardless of any or all other resolutions or provisions, and if other resolutions or constitutional changes are in conflict with the above state rules, they shall be henceforth repealed, rescinded and expunged from the records.

Amendment to Constitution and bylaws of the Crow tribal council

The Constitution and Bylaws of the Crow Tribal Council shall be amended by adding Article IX, which shall read as follows:

Article IX

Section 1.—The Crow Tribe through the Crow Tribal Council shall have power to establish, own, operate, maintain and engage in any business or business enterprse, either as sole owner and operator, or jointly with any person, firm or corporation, or jointly with any agency or department of the Government of the United States of America. For the purpose of carrying out the powers herein set forth, the Crow Tribal Council is authorized and empowered to use and expend tribal funds of the Crow Tribe.

Approved:

ROBERT L. BENNETT,
Commissioner of Indian Affairs.

DECEMBER 28, 1966.

Bylaws

Article I—Duties of Crow Tribal Council

Section 1.—The Chairman of the Council shall preside over all meetings of the Council, perform all duties of the Chairman and exercise any and all authority detailed by the Council, and shall be entitled to vote only in case of a tie.

Section 2.—The Vice-Chairman shall assist the Chairman when called upon so to do; in the absence of the Chairman, shall preside and when so presiding shall have all the privileges, duties, and responsibilities of the Chairman.

Section 3.—The Secretary of the Council shall forward a copy of the minutes of all the meetings to the Superintendent of the Reservation, and the Commissioner of Indian Affairs, and the Regional Director, and shall conduct all correspondence of the Council and shall keep all records and minutes of the meetings, records as to expenditures and allotment of tribal gratuitous and other funds over which the Council has sole charge.

Section 4.—The duties of all appointed special committees or officer of the Council shall be clearly defined by resolutions of the Council at the time of their creation or appointment. Such committees and officers shall report from time to time as required to the Council and their activities and decisions shall be subject to review of the Council.

Section 5.—Regular and emergency meetings of the Crow Council shall be held on call of the Chairman at Crow Agency, Crow Agency, Montana.

Section 6.—No business shall be transacted unless a quorum of 100 is present.

Section 7.—Order of business:

(a) Call to order by Chairman
(b) Reading of minutes of last meeting
(c) Unfinished business
(d) Reports
(e) New business
(f) Adjournment

Section 8.—It shall be the duty of the Chairman of the Council to duly notice all tribal council meetings of the tribe for a period of at least seven (7) days prior to such meeting date, for decisions of the Crow Tribe affecting the sale or lease of tribal property, or of legislative matters affecting the Crow Tribe.

Section 9.—A salary is to be paid to each officer or member of the Crow Tribal Council when serving as an authorized delegate as follows:

	Per day
Within the State of Montana	$10
Outside the State of Montana, with the exception of trips to Washington, D.C.	15
To Washington, D.C.	25

In addition to the above scale of salaries a per diem is to be paid each officer or member of the Crow Tribal Council, computed in accordance with the U.S. Government Travel Regulations and in addition transportation via rail, air or personal car, whichever is administratively determined to be in the best interest of the Crow Tribe.

Approval

Resolution No. 31 adopted February 3, 1955, approved by letter to the Chairman of the Crow Tribal Council from Commissioner Glenn L. Emmons dated March 18, 1955.

Article II—Ratification of Constitution and Bylaws

This Constitution and the attached Bylaws, when adopted by a majority of those attending District Councils called to vote on accepting a Constitution and Bylaws shall be binding upon the Crow Tribe.

Certificate of adoption

Pursuant to the Constitutional election held on June 24, 1948, this Constitution and Bylaws of the Crow Tribal Council of Montana, was adopted by a vote of 295 for and 130 against in an election in which 425 votes were cast.

ROBERT YELLOWTAIL,
Chairman, Tribal Council.
GEORGE HOGAN, SR.,
Secretary, Tribal Council.
L. C. LIPPERT,
Crow Agency.

A Resolution of the Crow Tribal Council Providing for the Amendment of the Constitution and Bylaws of The Crow Tribal Council

Be it resolved by the Crow Tribal Council that the Constitution of the Crow Tribal Council be, and the same hereby is amended by adding thereto, and making a part thereof Article IX which shall read as follows:

"Article IX

Section 1.—The Crow Tribe through the Crow Tribal Council shall have power to establish, own, operate, maintain and engage in any business or business enterprise, either as sole owner and operator, or jointly with any person, firm or corporation, or jointly with any agency or department of the Government of the United States of America, and for the purpose of carrying out the powers herein set forth, the Crow Tribal Council is authorized and empowered to use and expend tribal funds of the Crow Tribe

Passed, adopted, and approved by the Crow Tribal Council by 188 votes for passage, adoption and approved and 67 votes against passage, adoption and approval this 8th day of October, 1966.

——— ———,
Chairman of Crow Tribal Council.

Attest:

——— ———,
Secretary of Crow Tribal Council.

Approval

This Constitution and Bylaws, having been proposed and ratified by the members of the Crow Tribe on June 24, 1948, at a referendum is herewith approved.

WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner.

Resolution No. 62-11

A resolution of the Crow Tribal Council providing for the amendment of the Constitution of the Crow Tribal Council, by adding to and changing art. II, art. VII, and art. VIII, by making certain changes by adding to and changing art. II, art. VI, adding sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, art. VIII, adding sections 1, 2, and for other purposes.

Whereas, there has been a need for certain changes in the Crow Tribal Constitution, it is deemed to be in the best interests of the Crow Tribe that Resolutions 107, 140, 145, 223, and 152, shall be, and the same are hereby rescinded, repealed and expunged from the Crow Tribal records;

And whereas, it is evident that the rescission will enable tribal members to appoint committee members and delegates more democratically in accordance with certain existing provisions of the Crow Tribal Constitution. Now, therefore, be it

Resolved, by the Crow Tribal Council in Crow Tribal Council duly called and held this 18th day of December, 1961, that the Constitution of the Crow Tribal Council be, and hereby is amended by making the following changes in the present Crow Tribal Constitution, to-wit:

Article II

The council shall elect every two (2) years, in conformity to its rules of procedure, a Chairman, Vice-Chairman, Secretary and Vice-Secretary. The Chairman shall have no vote unless there be a tie vote before the council. The election for these officers shall be held the second Saturady of May every other year after May 12, then the first election shall be held under this constitutional change. Officials are to assume their duties July 1, after election.

Article VI

The Powers, Duties, and Functions of the Council:

1. The Council shall establish its own rules of procedure.

2. Meetings. There shall be regular Tribal Council meetings held each year on the second Saturday of January, the second Saturday of April, the second Saturday of July, and the second Saturday of October, and as many additional meetings shall be held as tribal business may require. All meetings shall be called by the Chairman and the Committee.

3. Notice of meetings and agendas. It shall be the duty of the Secretary, or in his absence, the Vice-Secretary of the Crow Tribal Council to give notice of all Tribal Council meetings of the Crow Tribe in writing for a period of at least seven days prior to each meeting date. Notices shall be posted at one public place in each district of the reservation, and at the Agency Headquarters, and, where possible, in the local newspapers and by radio broadcast. Notices in addition to the date, time and place of the meeting, shall list in numerical order the business to come before the Tribal Council meeting. No business shall be transacted at the meeting unless it has been included in the public notice. Copies of proposed resolutions or other business to be considered shall be furnished to the elected district representatives by the Tribal Secretary seven (7) days prior to meeting. dates.

4. Items of business, Agenda of the Tribal Council meeting shall include all items required by the (1) Tribal Chairman and committee. (2) Superintendent of the Crow Agency, and (3) any petition duly signed by 100 qualified voters. All requests to the Chairman and committee for a general Council meeting shall be in writing and shall clearly state the nature of the business to be presented before the General Council.

5. If the Commissioner of Indian Affairs desires to present any matter to the council for its action, such request shall be presented in writing to the Chairman or the committee, who shall as herein provided, advertise such request as provided, and set the date for the Council Sessions.

6. Except where otherwise specified in this constitution and By-Laws, decisions of the Council shall be by a simple majority of the vote cast.

7. The Council shall perform the duties assigned to it under this Constitution and By-Laws and shall have such powers in addition to those expressly conferred on it thereunder as may be necessary to achieve its effective operation and to realize its objective.

8. All matters presented and coming before the Crow Tribal Council to be voted upon by the members of the Crow Tribe shall be decided and determined by a simple majority vote.

9. There shall be a committee composed of two (2) members from each of the Six Districts of the Crow Reservation and two (2) members from off-the-reservation Indians elected for a term of two (2) years, in accordance with the Tribal Council's rules of procedure, to act as an executive committee to work with the officers under the general direction of the Council. The first election of these committee members shall be held within 30 days from and after adoption of this Constitutional amendment, and all subsequent elections to be held the second Saturday of the month of May at 2-year intervals on alternate years from the tribal officials election. Each district shall select its own election judges from within said district whose expenses shall be paid from tribal funds. The results of such elections shall be final and conclusive.

10. The Crow Tribe, through the Crow Tribal Council, shall have the power to levy, assess and collect taxes and license fees upon non-members of the Crow Tribe doing business within the boundaries of the Crow Indian Reservation, subject to review by the Secretary of the Interior.

Article VIII

Section I.—This Constitution and By-Laws shall be amended by a majority vote of the qualified voters of the Crow Tribe voting at an election called for that purpose by the Tribal Council, provided that no amendment shall become effective until it shall have been approved by the Commissioner of Indian Affairs or his authorized representative.

Section II.—All eligible tribal members may vote at such duly called elections. The enactment of rules and procedure for conducting such an election shall be the responsibility of the Tribal Council. The Tribal Council shall enact an election ordinance. And, be it further

Resolved, That the above listed changes are those which the Tribal Council wishes to make in the present Crow Tribal Constitution and shall do so regardless of any or all other resolutions or provisions, and if other resolutions or constitutional changes are in conflict with the above state rules they shall be henceforth repealed, rescinded and expunged from the records.

Passed, adopted, and approved this 18th day of December, 1961, by the Crow Tribal Council at a duly assembled meeting of said council according to a notice duly given on December 11, 1961, in a duly called Council, a quorum being present at Crow Agency, Montana. Votes for 280; Votes against, None.

ROGER STOPS,
Chairman, Pro-Tem. Crow Tribal Council.

Attest:
ARTHUR R. GARRIGUS, *Secretary, Pro-Tem.*
Crow Tribal Council.

APPENDIX D

Budget for fiscal year 1976, tribal government

1100:	
Tribal council and staff salaries	
Chairman	$18,000
Vice chairman	10,000
Secretary	18,000
Vice secretary	10,000
Business manager	9,473
Bookkeeper	6,764
Clerk-steno	5,996
Typist	5,470
Janitor	5,470
Custodian	5,470
Miscellaneous wages	2,500
Total 1100	97,143

1200:	
Tribal council and staff expenses	7,000
Travel expenses for tribal officers	7,000
Per diem	7,500
Transportation	6,500
Subtotal 1200	28,000
1210: Tribal council miscellaneous expenses	5,000
Total 1200	33,000
1300: Tribal attorneys and litigation:	
1301 General counsel	15,000
1302 Miscellaneous litigation (1301)	5,000
1303 Water rights litigation	30,000
1304 Mohasco litigation	20,000
1305 Fish and game	25,000
Total 1300	95,000
1400: Tribal projects and programs:	
1401 Youth and recreation activities	1,600
1402 Community health projects	1,500
1403 Youth camp—Black Canyon—yearly maintenance man	26,400
1404 Crow tribal construction enterprise operating expenses	7,000
1405 Sewer and water—tribal facilities	7,750
1406 E.D.A. support funds	2,000
1407 Trainees	7,500
1408 HEW	33,000
1409 Adult education	3,000
1410 Buffalo management and Buffalo pasture warden	10,000
1411 Crow fair	15,000
1412 VISTA	15,000
1413 E.D.A. interest payment	4,700
1414 Interest payment for advance funds	15,000
1415 Utilities commission	20,000
Total 1400	161,450
1500: Committees	
1501 Credit	7,500
1502 Health and education	3,500
1503 Enrollment	2,000
1504 Industrial development	6,000
1505 Land purchase and sales	4,000
1506 Executive	6,000
1507 Law and order	5,000
1508 Mineral	3,000
1509 Conservation enterprise	500
1510 Water resources	3,000
1511 Housing authority	4,000
1512 Recreation and tourism	3,000
Total 1500	47,500
1600: Operational expenses	34,000
1700: Capital equipment	5,000

Community services

2100: Health (dental and eye examination)	5, 500
2200: Education scholarship	45, 000
2300: Welfare:	
2310 Surplus commodities	14, 000
2320 Glasses for the needy at P.H.S. only	1, 200
2330 Burial funds	20, 000
Total 2300	35, 200
2400: Law and order:	
1 Chief judge	12, 000
2 Associate judges at $3,500 each	7, 000
1 Court clerk	6, 300
5 Dispatcher at $6,000 each	30, 000
5 Special Police for celebrations	3, 000
5 Employees benefit contributions at 15 percent	8, 763
5 Food	10, 000
5 Police vehicles at $5,000 each	25, 000
5 Utilities	3, 000
5 Auto expenses, operating costs	12, 000
5 Per diem, travel, for training	1, 500
5 Communications	3, 000
5 Supplies	2, 000
5 Personal equipment	4, 000
Total 2400	127, 683

Economic development

3300: Credit (local funds):	
Loan assistant and finance specialist (GS-9 step 1)	12, 841
Bookkeeper (GS-4 step 1)	7, 596
Fieldman (GS-4 step 3)	8, 102
Withholding tax and FICA	4, 300
Travel	1, 200
Other expenses and training	1, 000
Total 3300	35, 039
3310: Credit (RDO 2651):	
Personal services	12, 000
Travel and transportation	1, 000
Supplies and other expenses	750
Contractual services (training)	600
Common services	1, 500
Total 3310	15, 850
1600: Tribal operations:	
Game wardens, 10 at $7,000 each	70, 000
Travel expenses for wardens at $200 per month for each	24, 000
Equipment, expenses, and miscellaneous	2, 000
Total 1600	96, 000
3900: Utilities on tribal property	16, 000
3910: Employees benefit contribution	15, 000

4200: Major repairs	8,500
4300: Property and casualty insurance for tribal operations and officials	10,000
Grand total	905,965

PATRICK STANDS OVER BULL,
Chairman, Crow Tribal Council.

Attest:

TYRONE L. TEN BEAR,
Secretary, Crow Tribal Council.

Recommended:

——— ———,
Superintendent, Crow Indian Agency.

APPENDIX E

Objectives of NCRP

The Research Project's objectives include:

1. The development and promotion of adequate environmental programs that will sufficiently protect the Northern Cheyenne Reservation land and people from internal and external pressures brought about by industrial development.
2. Aiding in the establishing and documenting the existence of cultural and historical sites.
3. The investigation and making of recommendations for controlling adverse sociological effects on the Northern Cheyenne people as a result of energy development.
4. Evaluation of the quantity and quality of water and coal resources on the reservation and assessment of the potential impacts of proposed resource development.
5. Aiding in the establishment of a viable economic community on the reservation.
6. The evaluation and making of recommendations for improving the Tribal judicial system and legislation.
7. Promotion of open lines of communication between the Northern Cheyenne Tribe and State, Federal and private agencies. Maintenance of an active role at the state and federal level in presenting the concerns of the Northern Cheyenne people.
8. The promotion of positive attitudes among Northern Cheyennes as an aid in maintaining survival as an ethnic group.
9. Promoting and aiding in the establishment of alternative means of self-improving through adequate education.
10. Aiding in the maintenance of Tribal identity and sovereignty.

APPENDIX V.—FEDERAL AUTHORITIES SUPPORTING TRIBAL POWER OVER NON-TRUST LANDS WITHIN RESERVATION BOUNDARIES

CIVIL JURISDICTION OF INDIAN TRIBES OVER FEE PATENT LANDS

Whether or not Indian tribes may properly exercise police powers over fee patent land, particularly in the areas of zoning and regulation, has not been specifically addressed by the Supreme Court of the United States, but case law strongly supports the proposition that tribes do have this power. There are two lines of cases supporting this proposition. One involves the types of powers that Indian tribes may exercise as incidents of their sovereignty, and two, where those powers may properly be exercised. In order to determine what types of powers a tribe legitimately may exercise, one needs to examine *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832). In summary, this court held that while Congressional power over Indians was determined to be absolute, all powers not explicitly taken from the tribe reside with the tribe.

While there has been modification in this holding, particularly as they relate to the exercise of state power on reservations, the principle of the case of retained tribal powers has never been overruled. In *Iron Crow* v. *Ogalala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956), the court noted "The tribes . . . still possess their inherent sovereignty except when specifically taken from them." The issue still remains whether or not Congress has ever taken affirmative steps to remove a tribe's police power. The courts have consistently held that Indian tribes have the power to regulate the conduct of nonmembers on the reservation. This may be illustrated best by a brief sampling of the cases supporting this proposition. In *Morris* v. *Hitchcock*, 194 U.S. 384 (1904), the Supreme Court affirmed the lower court's dismissal of a suit by a nonmember of the Chickasaw Nation to enjoin seizure of the nonmember's cattle by federal officials. The Court held that the act of the Chickasaw legislature imposing a permanent tax on cattle belonging to nonmembers was valid.

In *Buster* v. *Wright*, 135 Fed. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599, the Eighth Circuit affirmed of a suit brought by a nonmember of the Creek Nation who challenged a tax on his business. Again, the Court, in affirming the dismissal emphasized the power to tax was one of the inherent and essential attributes of original sovereignty. The Court, further, in dicta, noted that this power extended to land that may be owned by private individuals. In *Iron Crow*, *supra*, the precise question was whether or not a grazing privilege tax against a nonmember lessee was valid. The Eighth Circuit affirmants held that the tribe possessed the power to tax, which was an inherent incident of its sovereignty that had never been removed. *See also Barta* v. *Ogalala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958).

Tribal control over reservation real property has been upheld in several cases. *See Delaware Indians* v. *Cherokee Nation*, 38 Court of Claims 234 (1903), decree modified 193 U.S. 127. *See also James H. Hamilton* v. *United States*, 42 Court of Claims 282 (1907).

A further illustration of the tribe's inherent power can best be obtained by an examination of the recent Supreme Court cases involving exercise of state power on a reservation. While the primary focus of these cases is on whether a state may legitimately exercise power over certain types of activities on reservations, a determining factor on state power, in the absence of a governing act of Congress, is whether or not a claimed state act interferes with a tribe's right of self-government. In *Williams* v. *Lee*, 358 U.S. 217 (1959), and *McClenahan* v. *Arizona Tax Commission*, 411 U.S. 177 (1975), the Court found inherent tribal powers that existed even though the tribe chose not to exercise those powers. Similarly, in *United States* v. *Mazurie*, 419 U.S. 544 (1975), the Supreme Court upheld the power of Congress to delegate to a tribe authority to regulate the sale of alcoholic beverages by non-Indians on fee patent land within a reservation because of the independent authority of tribes over this subject matter. *Mazurie* is an important case for finding jurisdiction because *Mazurie* is a crossover

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between what lands may the tribe exercise these inherent powers on. See also, as to the exercise of these powers over non-Indians, the discussion on tribal courts and particularly *Oliphant* v. *Schlie*.

The second major question that must be examined is where may a tribe properly exercise these powers. While at one time it may have been the intent of the General Allotment Act to free land from Indian control, the fact remains that the opening and patenting of reservation land does not automatically disestablish the reservation nor does it alter its boundary. *Matts* v. *Arnette*, 412 U.S. 481 (1973); *Seymore* v. *Superintendent*, 368 U.S. 351 (1961); *United States* v. *Celestine*, 215 U.S. 273 (1909). In all of these cases, the principle was established that in order to disestablish an Indian reservation, Congress must have intended to do so, and the intent must be clear. *See DeCoteau* v. *District County Court*, 95 S. Ct. 1082 (1972). In *DeCoteau* such intent was found, but the Court reaffirmed the fundamental principle that reservation status may survive opening to settlement and patenting of land. So that the issue of whether a tribe may properly exercise jurisdiction over fee patent land is determined by the status of the land rather than principles of inherent tribal sovereignty. Similarly, one may trace another line of cases, those which involve the concept of "Indian country" in 18 U.S.C. § 1151, which is the federal criminal jurisdictional statute involving Indian reservations.

In *DeCoteau, supra*, the Court found that the definition of § 1151 has a much broader effect in that in addition to defining areas of criminal jurisdiction, it also includes federal civil and tribal. Since the courts have found that federal criminal jurisdiction does exist on fee patent lands within the boundaries of a reservation, it follows that a tribe would have similar powers. Perhaps the strongest argument supporting tribal powers over fee patent lands is the fact that the Court has never addressed the issue. In the cases involving state-tribe conflict over jurisdiction, there has not been an inquiry into the precise status of the land, as to whether it was fee patent, allotment or tribal. This would seem to imply that the status is of little concern to the courts. The major support for the proposition that the fee patent lands may not be under tribal jurisdiction is derived from Section 6 of the General Allotment Act, which provided that Indians who received fee patents under that Act become subject to the civil and criminal laws of the state or territory in which they resided. This has been interpreted as meaning that allotted lands passing out of trust were taxable, but it has never been held that this provision removed tribal jurisdiction. In fact, with the passage of § 1151, in defining Indian country to include fee patent land on reservations it would appear that § 6 is no longer relevant.

APPENDIX VI.—FIELD STUDY OF DISTINCTION BETWEEN IRA AND NON-IRA TRIBAL-BIA RELATIONSHIP

I. INTRODUCTION

This report is to deal with the distinction between a Tribe re-organized under the Indian Reorganization Act (IRA) and a Tribe not so re-organized. For this study, the Blackfeet Tribe of Montana was chosen for the IRA Tribe and the Navajo Tribe of New Mexico, Arizona, and Utah was chosen for the non-IRA Tribe. In light of Federal policy towards Indians, especially that of self-determination and self-government, this report shall deal almost exclusively with the concept of Secretarial powers to review actions by Tribal Councils. There will also be some analyzation of advantages and disadvantages of a Tribal charter in relation to economic development.

In addition to the above two major issues concerning the IRA, there are some other distinctions that are also important. These distinctions revolve around the concept that if a Tribe rejects the chance to reorganize under the IRA, they also choose not to accept any of the benefits of the Act. This creates a situation where: (1) Period of trust status of Tribal land were not extended for non-IRA Tribes under § 2; (2) the Secretary of Interior cannot restore ceded land for non-IRA Tribes, § 3; (3) no money can be appropriated to non-IRA Tribes for land consolidation, § 5; (4) non-IRA Tribes cannot gain credit under the revolving fund under § 10; (5) members of non-IRA Tribes may not be eligible for Indian Preference under § 12 of IRA, nor are they eligible for educational loans or grants under § 11; (6) and, lastly, exercise of tribal authority is limited by Secretarial discretion under § 16.

The rigorous application of excluding non-IRA Tribes from the benefits of the IRA has been somewhat diluted by Congressional and Executive action, and Secretarial discretion. Congressional approval is still necessary to return ceded land to non-IRA Tribes. However, in 1948, Congress voted to make monies from the revolving loan fund available to non-IRA Tribes, 25 U.S.C. § 482. Eligibility for Indian Preference and for educational grants arises under other Congressional Acts and Secretarial discretion, providing for education money and for Indian Preference.

The problem of returning land to trust status is one which has not been dealt with by Congress. Each year, the Secretary of Interior has to place non-IRA Tribal land into trust for that year. Secretarial discretion also controls the exercise of Tribal authority. Problems concerning exercises of non-IRA Tribal authority will be considered in the discussion of Secretarial review powers.

II. SECRETARIAL REVIEW

The concept of Secretarial review appears to arise from 25 U.S.C. § 81, which provides: "No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows: * * *"

But this provision alone does not confer the broad review powers that are claimed by the Secretary of Interior. Those additional powers may be implied from the policy of 25 U.S.C. § 81 and, from case law, a beginning with the Cherokee cases, which first approved the guardian-ward relationship, and *Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed 228 (1886) which found there was a duty upon the United States to protect the Indian wards. From these cases, it can be implied that Secretarial review power is broad enough to "protect" Indian trust property.

In practice, however, Secretarial review power is exercised in different ways, depending upon whether the Tribe has re-organized under the Indian Reorganization Act (IRA) or whether they have chosen not to re-organize. If the Tribe has re-organized under the IRA, the Secretary is bound by limitations upon review written into the Tribal Constitution. If the Tribe has not re-organized under the IRA, the Secretary is bound only by his discretion and the policy and substantive law found in the United States Code and case law.

Looking at the Blackfeet Tribe, a Tribe re-organized under the IRA, I found several disparities between the policy of Secretarial review and review as a practical matter.

According to Roland Kennerly, Sr., who served on the Blackfeet Tribal Council for eighteen years and who was on the Council at the time of the re-organization under the IRA, historically, the procedure for Secretarial review was such that every ordinance or resolution passed by the Council was reviewed by the Secretary of Interior. A copy of the ordinance or resolution would be sent directly to Washington, if the Secretary decided that the ordinance was "improper", or if changes were necessary, the resolution was sent back to the Tribal Council. At that point, the Council had to try to align the policy they wanted to implement with the changes that the Secretary of Interior thought were necessary. Mr. Kennerly stated that he could not remember an ordinance being turned down, it seemed that the Council could always make the necessary alignment.

Apparently, through the years, the attitude of the Secretary of Interior and the Bureau of Indian Affairs has changed in such a manner that only certain ordinances now require Secretarial review or approval.

According to Mr. Schulhammer, Acting Superintendent of the Blackfeet Agency, only those ordinances or resolutions that are specified in the Blackfeet Constitution as reviewable are reviewed by the Secretary of Interior. Article VI, § 1 of the Blackfeet Constitution provides for Secretarial review of ordinances and resolutions dealing with employment of legal counsel, creating a plan of operation, assessments upon non-members residing or trading upon the reservation, regulation of business or professional activities, exclusion, requisition of community labor, regulation of inheritance, and the appointment of guardians. Any ordinance or resolution passed by the Tribal Council not concerning any of the above areas is not subject to Secretarial review. (See, Appendix A).

In addition to substantive limitations upon the Secretary of Interior by the Tribal Constitution, the Secretary is also limited by review procedures if they are provided for in the Constitution. Article VI, § 2 of the Blackfeet Constitution provides the procedural limitations. Under that section, the procedure is outlined as follows: The council passes an ordinance or resolution, it is the presented to the Superintendent for review if review is provided for. The Superintendent has ten (10) days to act upon the resolution; if he approves the ordinance or resolution, it is then sent to the Secretary of Interior who has ninety (90) days in which to rescind the action of the Superintendent, if the Secretary does not act within ninety (90) days, the ordinance is deemed approved. If, however, the Superintendent disapproves the resolution, the Tribe has the option of either trying to align the reason for disapproval with the policy they want to implement or voting to bypass the Superintendent and to take the issue directly to the Secretary of Interior. If they choose to bypass the Superintendent and go directly to the Secretary of Interior, the Secretary has ninety (90) days in which to act upon the resolution or ordinance; if he fails to act, the ordinance or resolution is deemed approved.

For Tribes organized under the IRA, the system seems to be well structured in favor of the Tribe. However, there are some disparities. The furthering of the policy of self-determination for Indian Tribes and the policy of Secretarial review often clash. That clash creates policy issues which have the practical effect of thwarting the Tribes' attempts to control its destiny.

The major problem with Secretary review is creating a working definition of review. In a practical sense, there are two types of review. One type of review is the simple act of the agency Superintendent reviewing Tribal ordinances and resolutions which is necessary for the Bureau of Indian Affairs to be knowledgeable of the activities, issues, policies, and that the Tribe is concerned with.

The second type of review is the scrutinizing review process provided for in the Tribal Constitution. In a technical sense, there is little difference between the two types of review. If, during the first review, the review for knowledge and information, the Secretary may be able to find cause to review some areas over which he has no authority.

Ordinarily, the definition of review would have no bearing on an ordinance that is passed pursuant to a Tribal Constitution not requiring review. But it is at this point the second disparity in the system arises. According to Mr. Schulhammer, because the original constitution was reviewable and any amendments thereto is reviewable, any ordinance or resolution repugnant to that constitution is reviewable. A case in point is that the Blackfeet Tribal Council passed an ordinance concerning law and order. The Blackfeet Constitution does not provide for Secretarial review of law and order ordinances with the exception of exclusion. This ordinance did not deal with exclusion, but it was violative of a provision of the Tribal Constitution concerning the subject matter jurisdiction of the Tribal Court. Mr. Schulhammer disapproved the ordinance although according to the Tribal Constitution he did not have the power to review the ordinance.

In the above instance, the lack of definition of Secretarial review power allowed the Secretary of Interior to use discretionary power to locate a reviewable issue and the lack of definition of the scope of Secretarial review power allowed the Secretary to operate outside the parameters of the Tribal Constitution.

Another disparity in this system concerns the source of power of review. There are basically three sources and limitations on that of Secretarial review power. Looking at the policies behind both the sources and limitations, it appears that there are several instances in the Blackfeet Constitution in which review power is granted, but review is not necessary.

The three sources and limitations of power are: (1) the trust relationship between the Federal Government and the Tribes; (2) the duty of the Secretary of Interior and the Bureau of Indian Affairs to maintain the trust; and (3) the concept and policy of self-government and self-determination as exemplified by the Indian Self-Determination Act and Menominee Restoration Act.

Because the Secretary of Interior is charged with the duty to protect the trust, i.e., trust properties, he must make decisions concerning a reservation with the policy of protection of its assets as his foremost consideration. But those policy considerations must be aligned with the policy of Indian self-determination and responsible self-government.

In this context, Secretarial review may not be necessary in some instances. Although it is granted, the Secretary may be violating Federal policies by reviewing those ordinances. A good example of this situation is that the Blackfeet Constitution provides for Secretarial review of exclusion ordinances. Exclusion ordinances in themselves have no relation to the status of trust property. If an individual member is excluded, he may have the right to compensation for property he left behind, but the effect of the ordinance on the corpus of the trust is nil. The Blackfeet Constitution provides for Secretarial review of the appointment of guardians. This may be justified under protection of trust property of the minor or incompetent.

Yet, the policy of protection of the trust must be balanced with the policy of self-determination. When this balance is struck, the power to review exclusion ordinances should give way to the policy of self-determination. The policy of self-determination in deciding who should be excluded outweighs the policy of protecting the trust property. On the other hand, the policy of self-determination may not outweigh the policy of trust protection in the instance of the appointment of guardians.

The problems of lack of definition of powers of review and their limitations is severe for those Tribes organized under the IRA. But for those not so organized, the problem is compounded by total Secretarial discretion concerning both substantive review and procedures concerning review.

Problems concerning Secretarial review over actions by non-IRA Tribes are typified by the Navajo Tribe. According to Bob Moelher of the Field Solicitor's Office at Window Rock, Arizona, Secretarial review power flows from 25 U.S.C. § 81. But, technically, under that provision, the Secretary's power of review is limited to actions involving the trust property. In a practical sense, however, the review authority has been expanded into areas not actually involving trust property. Under the present system, Tribal Council resolutions are divided into three categories: Type A, which require approval by the Secretary of Interior;

Type B, which require approval by the Area Director; and Type C, which require no approval. (See, Appendices B and C).

Under the non-IRA system, the Secretary of Interior provides substantive and procedural rules concerning his review power. For the IRA system, the Tribal Constitution provides those guidelines for review. However, when it comes to the actual exercise of review powers, the Secretary uses his discretion in approving or disapproving Tribal Council actions, regardless of the re-organizational status of the Tribe.

Basically, because of the lack of IRA constitution, the Navajo's must follow Secretarial discretionary procedure and substantive limitations. Since the Secretary is not bound by any substantive or procedural action by the Navajo Tribe, the Tribe cannot force the Secretary to act and his failure to act raises no presumption of acting. So, the Secretary of Interior can sit on a Navajo Tribal Council resolution, ad infinitum, leaving the Tribe with no recourse. In addition to leaving the Tribe with no recourse for non-action by the Secretary of Interior, the Secretary can change the substantive guidelines concerning his review power. This is exemplified by the fact that Appendix B and Appendix C are not the same. Appendix B being the more broad concerning Secretary review powers than Appendix C.

In order for the non-IRA Tribe to make use of the policy of self-determination and to become more stable and responsible governments, there must be some attempt to set permanent substantive and procedural parameters which would define Secretarial review powers.

But the problem of lack of definition of review and lack of limitation on the scope and nature of review is a problem that exists for both IRA Tribes and non-IRA Tribes. In order for these systems of Secretarial review to work properly and for Indian Tribes to fully attain the goals set forth in the policy of self-determination, the concept of Secretarial review and the scope and nature of review must be defined and those authorized to review must follow that definition.

III. TRIBAL CHARTER

The second major issue concerning the IRA centers around the policy of economic self-sufficiency which is implemented through the issuance of a corporate charter. According to § 17 of the IRA, 25 U.S.C. § 477, upon petition of one-third of the adult Indians, the Secretary can issue a charter of incorporation to such Tribe. Apparently, the theory behind this section is that, with the charter, it would be easier for the Tribes to enter into contracts and take on more economic responsibility because the people and corporations with whom the Tribe is dealing would understand its corporate structure and economic standing.

Apparently, the test for the validity or invalidity of the policy and theory behind the issuance of a Tribal charter should rest on the Navajo Tribe. That Tribe has no Tribal charter, however, that Tribe has fared very well in terms of economic manuverability and self-sufficiency. They have entered into multi-million dollar contracts with major corporations for natural resources exploration and exploitation. They have contracted with Federal and State governments, and they have made loans. All of these actions, of course, are subject to review and limitation by the Secretary of Interior. However, it appears that the lack of a corporate charter has not hindered the ability of the Navajo Tribe to enter into contracts and to assume a status of economic responsibility.

In order for Tribal charter to show some davantage, it must provide more than a menas for economic manuverability and self-sufficiency in light of the Navajo precedent. There needs to be at least some implication of a grant of power in addition to provisions allowing for economic responsibilty and self-sufficiency. However, it appears that the Tribal charter may, in fact, limit both the sovereign power of the Tribe and its economic responsibility and self-sufficiency.

In analyzing the Blackfeet Tribal charter, issued in 1936, it appears that the Tribe may be limiting its powers of contract. Under Article V, the powers of the corporation are defined. Article II, § B(1) limits the power of the corporation to sell assets exceeding $10,000 without a referendum. Article V, § B(2) states that no leases shall be made for more than ten (10) years, and leases for less require Secretarial approval. Article V, § F grants the corporation the power to enter into contracts and perform those contracts, provided that contracts for $10,000 must be approved by the Secretary of Interior. Article V, § G provides that for the purpose of a loan, except for a loan from the Secretary, approval of the Secretary is necessary for the loan and for the use of the money obtained by the loan. Article V, § H provides for depositing of corporate funds in a bank with proper insurance with approval of the Secretary of Interior.

All of the above provisions require approval of the Secretary of Interior. One method of analyzing those provisions is to look at them in light of the trust relationship and of the Secretary's duty to protect the relationship. In light of this policy, Secretary approval does not seem to be a limitation on Tribal economic manuverability and self-sufficiency. Under that policy, the Secretary can argue that he already has those powers in furtherance of his duty to protect the Trust property.

The problem, however, arises from Article VI of the charter which provides for termination of those approval powers by an action of the Tribe. Granted that action, too, must be approved by the Secretary of Interior. But the gist of the whole argument is that the Tribe has the power to grant and terminate Secretarial approval power concerning the charter and actions under that charter. By accepting the charter and those terms of the charter, the Tribe may have limited its economic maneuverability and self-sufficiency.

In comparing the chartered Tribe, the charters, provisions, and their practical effect with the Tribe with no charter, it appears that there is little or no practical difference. The Secretary, through his review power over actions by the non-chartered Tribe, effectuates the powers and policies that are granted to him by the chartered Tribe. Basically, the Tribal charter does not provide any advantage over the lack of a charter; and, in light of the policy behind its inception, its worth can only be justified if there is a distinct advantage.

IV. CONCLUSION

The policies of the Indian Reorganization Act appears to have been applied to all Indian Tribes regardless of whether they have voted to come within the act or not. IRA Tribes and non-IRA Tribes alike receive most of the benefits of the Act. There are a few areas in which the non-IRA Tribe appears to have been penalized. The problem of returning the land of the non-IRA Tribe to trust status and procedure for Secretarial review are the most indicative of these areas of penalization. But, these areas of penalization are areas of procedural policy rather than substantive law. The Secretary of the Interior could implement regulations which could provide for a more explicit and certain future for the trust status of non-IRA Tribal lands. Also, the Secretary could provide for a procedure of review of non-IRA Tribal actions that would create a presumption of Secretarial action if the Secretary holds an ordinance or resolution for a specified period of time without taking action. Neither of these implementations would be violative of the policy of the Indian Reorganization Act, in fact, both would further the stated goals of Tribal self-government.

The problem of a lack of definition of Secretarial review powers and a lack of limitation on the scope of those powers is one problem that transcends the question of whether the Tribe has voted to accept the IRA or not. The lack of definition of review allows the Secretary to act in a totally discretionary manner concerning what action of the Tribe is deemed reviewable. This applies to IRA Tribes, under Mr. Schulhammer's theory based on reviewability of the constitution, and to non-IRA Tribes because of the lack of a Tribal organic document to limit the review power of the Secretary. However, this definition should (1) not be subject to unilateral change; and (2) should accurately reflect the role of the Secretary of the Interior in fulfilling his trust responsibility and fully implement the policy of Tribal self-determination.

The Tribal charter appears to be superfluous. On its face, it appears to grant no more power than the Tribe already has in the area of economic affairs. In fact, it is possible that it may limit some of the actions of the Tribe by requiring referendums and Secretarial approval that may not be necessary, thus limiting the economic maneuverability of the Tribe.

From the issues discussed and from the situation investigated, it appears that with a very few exceptions, the policy of the IRA extends to all Tribes, IRA or not. Those few exceptions that are not extended to non-IRA Tribes could be so extended, further implementing the policy of the Indian Reorganization Act.

APPENDIX A

Article VI—Powers of the Council

Section 1. Enumerated powers.—The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

(a) To negotiate with the Federal, State, and local governments on behalf of the tribe and to advise and consult with the representatives of the Interior Department on all activities of the Department that may affect the Blackfeet Tribe.

(b) To employ legal counsel for the protection and advancement of the rights of the Blackfeet Tribe and its members; the choice of counsel and the fixing of fees to be approved by the Secretary of the Interior.

(c) To prevent the sale, disposition, lease, or incumbrance of tribal lands, interests in lands or other tribal assets, without the consent of the tribe.

(d) To advise the Secretary of the Interior in regard to all appropriation estimates or Federal projects for the benefit of the Blackfeet Tribe prior to the submission of such estimates to the Bureau of the Budget and Congress.

(e) To manage all economic affairs and enterprises of the Blackfeet Reservation, including all oil leases on tribal lands and the disposition of all oil royalties from tribal lands, in accordance with the terms of a charter to be issued to the Blackfeet Tribe by the Secretary of the Interior.

(f) To make assignments of tribal lands to members of the Blackfeet Tribe in conformity with Article VII of this constitution.

Amendment VI

(g) To manage tribal affairs in an acceptable and businesslike manner and in accordance with the administrative plan, called the Plan of Operations, and by amendments as necessary, subject to approval by the Secretary of the Interior or his duly authorized representative. All salaries or remuneration shall be paid as set forth in the Plan of Operations. The tribe shall pay only for services officially authorized in the administrative plan and actually received. The amount shall be a matter of public record. (Amendment VI approved August 3, 1934.)

(h) To regulate and license all business or professional activities conducted upon the reservation, subject to the approval of the Secretary of the Interior and to levy assessments for public purposes, provided that any assessments upon non-members trading or residing within the jurisdiction of the tribe shall be subject to the approval of the Secretary of the Interior.

(i) To exclude from the land owned by the tribe or its members persons not legally entitled to reside thereon, under ordinances which shall be subject to review by the Secretary of the Interior.

(j) To requisition community labor for public purposes of the tribe and to purchase land from members of the tribe under condemnation proceedings in courts of competent jurisdiction, subject to review by the Secretary of the Interior.

(k) To promulgate ordinances for the purposes of safeguarding the peace and safety of residents of the Blackfeet Indian Reservation, and to establish minor courts for the adjudication of claims or disputes arising amongst the members of the tribe, and for the trial and punishment of members of the tribe charged with the commission on offenses set forth in such ordinances.

(l) To regulate the inheritance of real and personal property other than allotted lands within the Blackfeet Reservation, subject to review by the Secretary of the Interior.

(m) To encourage and foster Indian arts, crafts, culture, and traditions.

(n) To enact ordinances not inconsistent with Article II of this constitution, governing adoption and abandonment of membership, and to keep at all times a correct roll of the Blackfeet Reservation.

(o) To provide for the appointment of guardians for minors and mental incompetents, by ordinances or resolutions, subject to the approval of the Secretary of the Interior.

(p) To promulgate rules and regulations governing fishing, hunting, and trapping on the Blackfeet Reservation.

(q) To adopt resolutions regulating the procedure of the council itself, and of other tribal agencies and tribal officials of the reservation.

(r) To delegate to subordinate boards or to cooperative associations which are open to all members of the tribe any of the foregoing powers, reserving the right to review any actions taken by virtue of such delegated powers.

Section 2. Manner of review.—Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservaion, who shall, wihin ten (10) days thereafter, approve or disapprove the same. If the superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement to the Secretary of the Interior, who may, within ninety (90) days from the date of the enactment, rescind the said ordinance or resolution for any cause, by notifying the tribal council of such decision. If the superintendent shall refuse to approve any resolution or ordinance submitted to him, within ten (10) days after its enactment, he shall advise the Blackfeet Tribal Business Council of his reason thereof. If these reasons apepar to the council insufficient, it may, by a majority vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

Section 3. Future powers.—The council of the Blackfeet Reservation may exercise such further powers as may in the future be delegated to the council by the members of the tribe or the Secretary of the Interior or by any other duly authorized official or agency of the State or Federal Government.

Section 4. Reserved powers.—Any right and powers heretofore vested in the tribe or band of Blackeet Reservation, but not expressly referred to in this constitution, shall not be abridged by this article, but may be exercised by the people of the Blackfeet Reservation through the adoption of appropriate by-laws and constitutional amendments.

APPENDIX B

Navajo Tribal Council Resolutions

Class A.—Require secretary's approval:

1. Any action to amend Regulation of 1938—setting up Tribal Government. Amendments to Charter regulations.
2. Enterprises above $50,000—total investment.
3. Resolutions containing laws with penalties.
4. Establishment of fees, guardians, Law and Order, Hunting and Fishing, Trading, Taxes.

Refer to FR 23-8398-D.I.-B.I.A. Order 551.

Class B.—Approval by area director:

1. Any resolution appropriating new money or establishing new department.
2. Budget transfer exceeding 10 per cent limit by department.
3. Enterprises with less than $50,000 investment.
4. Contracts other than attorney and consultants for land resources.

Employment of Enterprise Managers.

Land withdrawal for non-Tribal use (B.I.A., Public Health, Public School, etc).

Class C.—No approval required.

Budget and Finance resolutions are always Class "C."

APPENDIX C

Navajo Tribal Council and Advisory Committee Resolutions

Class "A".—Requires the Commissioner of Indian Affairs or Secretary of Interior's approval:

1. If specifically called for by the Tribal Council or Advisory Committee in the resolution or Plan of Operation adopted.
2. Matters involving the Navajo-Hopi dispute.
3. Revision of forms prescribed by 25 CFR.
4. Forestry matters that:
    (*a*) Designate any basis of volume determination pursuant to 25 CFR 141.14 other than Scribner Decimal C. Log Rule, cubic volume, piece count, lineal foot, or weight.
    (*b*) Issue special instructions as to deductions from timber sale receipts pursuant to 25 CFR 141.18.
    (*c*) Issue advertisements and approve timber sale volume in excess of 15 million feet board measure.
    (d) Accept payment of damage in full in settlement of civil trespass pursuant to 25 CFR 141.22 when such settlement is in excess of $5,000.
    (*e*) Approve timber management plans pursuant to 25 CFR 141.4.
5. Real Property Management matters that:
    (*a*) Approve surface leases pursuant to 25 CFR 131 which provide for a duration in excess of sixty-five years.

(*b*) Approve mineral leases of ceded or surplus lands unless title thereto has been restored to the Tribe or the mineral leasing of such lands is authorized by a specific statute.

(*c*) Approve royalty rates other than as authorized in 25 CFR regarding mineral leases and permits for oil, gas, and other minerals except sand, gravel, pumice, and building stone.

6. Credit matters that:

(*a*) Approve loans to the Tribe pursuant to 25 CFR 91 where the indebtedness to the lender exceeds $100,000 and any modification of such loans extending repayment terms.

(*b*) Prescribe interest rates on loans from the U.S. pursuant to 25 CFR 91.

(*c*) Approve articles of association and bylaws of cooperatives and credit associations and amendments or revocations thereof.

(*d*) Approve the form of organization of groups of Indians applying for loans to encourage industry.

7. Issuance of exceptions superseding the General Grazing Regulations contained in 25 CFR 151 as covered in 25 CFR 151.4.

Class "B".—Requires the Area Director's approval.

1. Tribal appropriation of new money (amending an approved budget), establishment of a new branch, office, department, or administrative subdivision of Tribal Government that will utilize Tribal moneys or trust lands.

2. Plans of Operation of Tribal enterprises, authorities, corporations, cooperatives and the like that utilize Tribal moneys or trust lands.

3. Contracts and agreements for legal counsel, claims counsel, and technical and consultant services utilizing Tribal funds. (Where resolution authorizes or directs execution of contract or agreement by the Chairman or other officer of the Tribe, the resolution itself might be a Class "C" with the instrument only requiring the approval.)

Class "C".—No approval required.

Resolutions of standing committees of the Tribal Council are Class "C".

APPENDIX VII

LEGAL ANALYSIS OF THE INDIAN REORGANIZATION ACT OF 1934

This paper will examine the Indian Reorganization Act (IRA) in light of contemporary policies. Because the IRA was, until the passage of the Indian Civil Rights Act,[1] the only piece of federal legislation addressed directly to tribal government, its policies as they affect contemporary Indian tribes must be examined. The IRA's enactment marked a major reversal in federal policy towards Indians; prior to its passage, federal policy, broadly stated, was directed towards the destruction of functioning tribal governments with the hope that the leaderless Indians would then pitch themselves and their land into the melting pot.[2] Although this policy was relatively short lived,[3] its effect on Indians was disastrous. While it is beyond the scope of this paper to trace in detail the history of Indian policy leading up to the passage of the IRA, it is important to review the origins of Indian tribal self-government for two purposes: (1) to show that the concept of Indian self-government was not an "exception" to the American scheme of government but was an integral part of it and (2) to show that the policy in the IRA of recognizing tribal governments was not an aberration of policy but was a corrective process.

THE POWER TO CREATE AND DEFINE TRIBAL GOVERNMENT

From the earliest years of the Republic the Indian tribes have been recognized as ,'distinct, independent, political communities,"[3] and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.[4]

Felix Cohen cites as the derivation of tribal powers the landmark case of *Worcester* v. *Georgia*[5] where the Supreme Court, per Chief Justice Marshall, in striking down a series of state statutes that attempted to infringe on the right of the Cherokees to self-government, held that the state was without power to enact such laws. In doing so, Marshall articulated the legal foundation for the continued existence of the right of tribal self-government. The Court's holding may be summarized as follows: (1) the United States has plenary power over Indians; (2) states may only exercise those powers over Indian tribes when Congress has authorized the states to do so; and (3) all rights not explicitly taken from the tribe reside in the tribe. The result in *Worcester* may be explained partially by the dispute over federalism. Marshall, a rabid federalist, chose to use the Cherokee cases as a vehicle to increase federal power.[6] The underlying political philosophy of tribal self-government as a right cannot be explained solely by Marshall's federalism. Without asserting that tribes retained rights of self-government, Marshall could not have used the case as a club for federalism.

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[1] 25 USC §§ 1321–1341 (1970) (originally enacted as Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 401–406, 601–701, 82 Stat. 79–80, 80–81).

[2] Books and articles on the Allotment Act are rampant; the best or at least most useful are: S. Tyler, A History of Indian Policy (1973); M. Young, Redskins, Ruffleshirts and Rednecks: Indian Allotments in Alabama and Mississippi, 1830–1860 (1961); Tuttle, Economic Development of Indian Lands, 5 U. Richmond L.R. 319–329 (1971); Stone, The Present Status of Indian Land Law, Okla. Bar Assoc. J. 72–102 (1919).

[3] Although the first recorded instance of allotment was as early as 1798 (Treaty of June 1, 1798, with the Oneida Nation, unpublished treaty, Archives No. 28) and although the process was used in numerous instances prior to what is now called the allotment period, the normal usage of the term allotment and allotment policy refers to the period from the 1870's to 1934. During this time allotment was used to break up tribal land holdings and tribal governments in order to make citizens out of the allottees. The policy was a disaster for Indians and resulted in millions of acres of land passing out of Indian ownership. See F. Cohn, Handbook of Federal Indian Law 207–217 (1942).

[4] F. Cohen, Handbook of Federal Indian Land 122 (1942), quoting *Worcester v. Georgia*, 31 US (6 Pet.) 515, 559 (1832).

[5] 31 US (6 Pet.) 515 (1832).

[6] Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500 (1969).

Worcester's premise was that the "Indian Nations had always been considered as distinct, independent, political communities . . ." [7] But this rather broad statement of Marshall's is grounded on concepts that are unique to American political philosophy. Marshall justifies the continued right of independent political tribal rights by looking to the law of nations,

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> * * * and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.
>
> The Cherokee nation, then, a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is, consequently void, and the judgment a nullity.[8]

This reasoning by itself is insufficient to totally justify tht unique place that Indians occupy in the American structure of government, for, if the dictates of international law mandated the results in *Worcester*, then other European colonial powers would have recognized indigenous peoples' rights of self-government in other colonial adventures. A quick look at the experience of other native peoples quickly shows that the principles of international law were largely ignored.[9] Although other native peoples signed treaties at various times, these treaties became meaningless as soon as the conquerer had sufficient power.[10] Even Canada, whose experiences with native people most closely parallel the United States, left Indians with no right of inherent self-government. Any rights of tribes to govern themselves flowed from the Indian Act [11] rather than residual sovereignty.[12] When looking at American history, one finds that the principles that Marshall articulated as the basis of Indian self-government were often ignored when applied to territories acquired by the United States in the land lust of manifest destiny.[13] However, only in the United States did native peoples retain rights of self-government after the conqueror acquired the ability to destroy them.

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[7] 31 US (6 Pet.) 515, 559 (1832).

[8] Id. at 560.

[9] The major use of international law in the context of rights of indigenous peoples involved land tenure. Credit for deriving theories to justify or explain the legal status of aboriginal land holdings is usually attributed to the Spanish, sixteenth-century theologian Francisco de Vitoria who, in *De Indias* and *De Jure Belli*, argued that Indians were the true owner of their lands and their failure to embrace Catholicism was of no effect on their right as landholders. He also argued that Indians were as smart as some Spanish peasants and that they therefore should have equal rights as to land tenure. Vitoria established the boundaries around land ownership and not those involving self-government. Witness the Spanish septem of granting rights to Indians rather than assuming that they were a sovereign people. Although there are many fine biographies of the principals involved in these ecclesiastical debates (e.g. H. Wagner, The Life and Writings of Bartolome de las casas (1967)), the two most useful books are L. Hanke, Aristotle and the American Indians (1959) & L. Hanke, The Spanish Struggle for Justice in the Conquest of America (1949). As these concepts relate to aboriginal title in the United States the article is Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947). The only flow in Cohen's article is the false hope that he raises based on a case (*Jones* v. *Meehan*, 175 U.S. 1 (1899)) that appeared to hold that taking of Indian land was compensable under the Fifth Amendment of the Constitution, an idea that the court quickly rejected.

[10] See generally A. Snow, The Question of Aborigines in the Law and Practice of Nations (1921).

[11] R.S.C. 1970, C 1–6.

[12] See generally P. Cummings and N. Mickenberg, Native Rights in Canada, (2d ed. 1972).

[13] A. Weinberg, Manifest Destiny: A Study of Nationalist Expansionism in American History (1963).

Since the principles of international law do not seem to be a wholly satisfactory answer to the origins of tribal self-government, one must look to other possible sources for this right. One possible source of a tribal right of self-government may be embodied in the very creation of the Union itself. The genius of the American system of government is the idea of separate sovereignties. Prior to the adoption of the Constitution no nation had ever formed a functioning government predicated on the idea of separate sovereignties.[14] One only need look at the debates on the Constitution to realize the uniqueness of the idea.[15] The acceptance of this idea was vital to the establishment of the republic, but once accepted it provided a philosophical basis for the acceptance of tribal government. Marshall's opinion would be possible only in a system that accepted separate sovereignties.

While there is no provision in the Constitution establishing the legal status of Indians,[16] the amount of circumstantial evidence available would strongly suggest that the founding fathers envisioned tribal governments as separate units of government. It is worthy of note that the same clause of the Constitution[17] reserving to the federal government the power to regulate commerce among the states also alots a power to regulate commerce among the Indians: Marshall's view of Indians as domestically dependent nations in *Cherokee Nation* v. *Georgia*,[18] suggests that they are integral parts of the federal system. The concept of reserved, inherent powers articulated in *Worcester* are not unlike the powers reserved to the people and the state by the 9th[19] and 10th[20] Amendments to the Constitution. The continued use of treaties even after the Indians were within the geographical boundaries of the United States further emphasized the belief in self-government.[21] But the strongest evidence in support of the proposition that tribal self-government is inherent in the American system is the actual practice of the United States in administration of Indian policy.

The early history of the Indian-Federal relationship consistently manifested the intent to allow continued self-government. The primary legislative response to problems of Indian administration up until the 1830's is evidenced by the Intercourse Acts[22] designed to separate "Indian Country" from the United States. The major thrust of these acts was to protect Indians from the incursion of the white-man. Although they were spectacularly unsuccessful and, their passage may have exacerbated the problem because of their lack of enforcement provisions; the intent of the acts clearly reflects a policy respecting the Indians' right to not be forcefully assimilated.[23] While some people hoped that the Indian land would someday become territories and later even states, the idea that they would become part of the general milieu of society was seldom expressed.[24] The power of removal became the solution when more lands were needed.[25]

It was not until 1817 that Congress passed any legislation expressly advertising to government within the Indian territory, and this related only to crimes that involved a non-Indian.[26] The importance of this legislation is its format, since it provided the model for federal legislation as to the internal power and structure of tribal government until 1968.[27] This basic philosophy towards tribal self-government was manifested in a variety of contexts. In order to show the pervasiveness of the concept it may be of some value to examine its application in several situations.

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[14] The Federalist Nos. 10, 20, 81 (A. Hamilton).

[15] G. Woods, The creation of the American Republic (1969).

[16] Margold, Indian's Not Taxed—Interpretation of Constitutional Provisions, 57 I. D. 195 (1940).

[17] U.S. Const. Art. I, § 8. cl. 3.

[18] 30 U.S. (5 Pet.) 1 (1831).

[19] U.S. Const. Amend. IX.

[20] U.S. Const. Amend. X.

[21] The United States continued to make treaties with Indians until 1871.

[22] Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743.

[23] See generally F. Prucha, American Indian Policy in the Formative Years; The Indian Trade and Intercourse Acts, 1790–1834 (1962). See also Reid, Conflict and Injustice: A Discussion of Frances Paul Prucha's "American Indian Policy in the Formative Years," 39 N.D. L. Rev. 50 (1963).

[24] M. Price, Law and the American Indian (Bobbs-Merrill: New York, 1973).

[25] See generally G. Foreman, Indian Removal (2d ed. 1953).

[26] Act of Mar. 3, 1817, ch. 92, 3 Stat. 383.

[27] Ex parte Crow Dog, 109 U.S. 556 (1883) and the legislative response of the Major Crimes Act.

In 1866, the new state of Kansas[28] attempted to tax Indian lands guaranteed to the tribes by a series of treaties. Kansas argued that the tribes involved had ceased to be Indians because they had adopted many of the customs and habits of the whiteman, but the court struck down Kansas' attempt at taxation by explicitly stating that the decision of which and how a tribe loses its right of self-government rests solely with the United States and is not conditioned on the conduct of the Indians involved.

Vine Deloria[29] uses this proposition to illustrate that the right of self-government is not predicated on cultural distinctions but exists as a political right derived from the previously discussed reasons underlying *Worcester* v. *Georgia*. The reasoning of the *Kansas* Indian Case is vital for contemporary policy, since it illustrates, and at least partially debunks, some contemporary theories of tribes' rights of self-government.

This attitude of Indians being separate political units was affirmed again in a different context when the Supreme Court ruled that an Indian was not a citizen under the Fourteenth Amendment to the Constitution, and in fact the whole concept of Indian non-citizenship re-enforces[30] this acceptance of the independent right of self-government.[31] In fact, one is hard pressed to find examples where the stated policy was to infringe on the right of tribal self-government. The most commonly cited examples of this policy to destroy tribal governments is the allotment period, to which the IRA was a response. The IRA was an attempt to return federal Indian policy to the earlier principle that Indian tribes were dependent sovereign nations. Since the IRA was a reaction to an unsuccessful policy, a reaction that sought to reassert tribal self-government, it is important to examine the underlying policies of the IRA in order to discuss its future impact, particularly as it affects continued rights of self-government.

Although the normal method of analyzing the IRA,[32] one involving a discussion of the act section by section, is satisfactory for purposes of statutory interpretation, such a method of analysis tends to obscure the underlying federal policies. If, however, one looks at the IRA from a functional perspective, the overall policy of the Act becomes clear, viz., the development of tribal governments such that they would become vehicles for facilitating the absorption of Indians into the Anglo world. The IRA was to accomplish this goal by making tribal governments into the image and likeness of other American governmental institutions[33] and by creating a means for economic development.[34]

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[28] The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867).

[29] V. Deloria, Of Utmost Good Faith 55 (Bantam ed. 1972).

[30] Elk v. Wilkins, 112 U.S. 94 (1884).

[31] Indians were not citizens until specifically made so in 1924, Act of June 2, 1924, ch. 233, 43 Stat. 253.

[32] See Comment, Tribal Self-Government and the Indian Reorganization Act of 1934, 70 Mich. L. Rev. 955 (1972) and F. Cohen, Handbook of Federal Indian Law 83–84 (1942).

[33] 25 USC § 476 (1970) provides for a constitutional framework.

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws. 25 USC § 477 (1970) provides for a charter-corporate Organization.

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law: but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. (June 18, 1934, ch. 576, § 17, 48 Stat. 988.)

[34] 25 USC § 469 (1970) provides:

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal

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Viewed in terms of its underlying policy concerns, the IRA can be divided into four parts: (1) recognition and reaffirmation of tribal governments as legitimate institutions,[35] (2) restraints, both specific and general, on federal plenary powers over Indians,[36] (3) programs and devices to assist economic development of Indian tribes;[37] (4) procedures to implement the above goals.[38]

The IRA must be considered "good" legislation because it imposes restraints on federal power over Indians and accepts the concept of tribal choice as to form of government . . . albeit within a limited framework. These restraints on Federal power are of two different types: first, and more important, the act stopped the allotment process[39] and permanently extended the trust status of Indian lands;[40] second, the IRA granted directly to the tribes additional powers.[41] The first restraint applies to all tribes;[42] the second, however, applies only to those tribes that ratified the IRA.[43] Tribes within the scope of the statute acquired the following additional rights and powers:

> To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.[44]

In reality, all these additional rights have nothing to do with the power of tribes to govern themselves; instead, the tribes under the IRA merely have the power of veto over certain exercises of federal power.

These additional rights, or federal restraints, ought to extend to all tribes. Presently, this grant of powers applies only to those tribes that chose to be under the IRA or those that failed to reject it.[45] In many instances, a tribe came or failed to come under the legislation by accident. The history of the IRA's passage

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(Continued)

year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title. (June 18, 1934, ch. 576, § 9, 48 Stat. 986.)

25 USC § 470 (1970) provides:

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. (June 18, 1934, ch. 576, § 10, 48 Stat. 986; June 29, 1960, Pub. L. 86–533, § 1(16), 74 Stat. 248; Sept. 15, 1961, Pub. L. 87–250, 75 Stat. 520.)

[35] 25 USC §§ 476–477 (1970).

[36] 25 USC § 475 (1970) preserves Indian rights in suits against the United States .

Nothing in sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of 25 U.S.C.

[37] 25 USC §§ 469–470 (1970).

[38] 25 USC § 478 (1970) provides a procedure for tribes to implement the provisions of the IRA.

Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice. (June 18, 1934, ch. 576, § 18, 48 Stat. 988.)

[39] 25 USC § 461 (1970).

No land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian. (June 18, 1934, ch. 576, § 1, 48 Stat. 984.)

[40] 25 USC § 462 (1970).

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress. (June 18, 1934, ch. 576, § 2, 48 Stat. 984.)

[41] 25 USC §476 (1970).

[42] See Gilbert and Taylor, Indian Law Questions, 8 Ariz. L. Rev. 102, 113, (1967).

[43] 25 USC § 478 (1970).

[44] 25 USC § 476 (1970).

[45] *Tribal Self-Government and the Indian Reorganization Act of 1934*, *supra* note 32, at 972.

is full of stories why tribes failed to ratify the Act.[46] Sometimes they were simply misinformed; other times they felt betrayed because of discrepencies between the proposal and the enactment of the Act.[47] The time limit the Act imposed for ratification [48] by the various tribes was a result of political compromise and has served only to create inconsistentcy of legal status between IRA and non-IRA tribes.

The Bureau of Indian Affairs and the Associate Solicitors for Indian Affairs Office take the position that as a matter of fact policy and practice, IRA and non-IRA tribes logically should be treated equally when the issue involved is one that the IRA addresses.[49] If this is true, and in the majority of cases it would appear to be, then no reason for continuing the statutory distinction between IRA and non-IRA tribes, at least in regards to federal restraints, presently exists.

This statutory distinction creates an ironic situation for the Navajo Nation, the largest and wealthiest Indian tribe in the United States. In an era when the watchword for federal policy is "self-determination," the Navajo Nation, because it specifically rejected the IRA four decades ago,[50] cannot hire an attorney without federal approval, must subject its lands to right of way without tribal consent, and must acquire Congressional approval for acquisition of additional land. In contrast, many small tribes may do all of the above because, having ratified the IRA, and came under the IRA by default they have the power as conferred by relevant statutes passed pursuant to the IRA.[51]

Clearly, an amendment to those sections of Title 25 protecting non-IRA tribes is needed so that such protection will extend to all tribes. If the practice of federal agencies is to treat tribes equally, then protections should be equally effective because of a statutory requirement and not because of administrative grace.

The IRA was a candid admission on the part of the United States that its immediate past Indian policy had obviously failed. One should not credit solely the IRA with fostering or even recognizing Indian governments as permanent institutions; instead, the IRA recognized and formalized these institutions with the aim of bringing Indians into the mainstream of American life.[52] The IRA sought to transform tribal governments into the image and likeness of comparable American institutions. The IRA manifests this intention in 25 U.S.C. §§ 476–477. Section 476 provides for a constitutional form of tribal organization;[53] section 477 enables tribes to organize under a corporate framework based on a charter.[54]

Unfortunately for the policy makers in Washington, Indians refused to disappear or assimilate. The IRA and its plans for reorganization of Indian governments was in practical terms a failure. Indians continued to govern themselves to a great degree as they had before the passage of the IRA although the press of allotment was removed. Constitutions and charters were adopted, but their effect on actual tribal government was minimal.[55]

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[46] 1935 Comm. of Ind. Ann. Rep. 113–122.

[47] *Id.*, at 135.

[48] 25 USC § 478 (1970) (The time for holding an election under this section was extended to June 18, 1936, by Act of June 15, 1935, ch. 260, § 2, 48 Stat. 988.)

[49] Interview with Morris Thompson, Reid Chambers *et. al.*

[50] *Tribal Self-Government and the Indian Reorganization Avt of 1934, supra* note 32, at 972.

[51] 25 USC §§ 475, 476 (1870).

[52] John Collier articulated one of the motivations behind the IRA in the following terms.

> And now, the sixth principle: The experience of responsible democracy, is, of all experiences, the most therapeutic, the most disciplinary, the most dynamogenic and the most productive of efficiency. In this one affirmation we, the workers who knew so well the diversity of the Indian situation and its incalcitrancy toward monistic programs, were prepared to be unreserved, absolute, even at the risk of blunders and of turmoil. We tried to extend to the tribes a self-governing self-determination without any limit beyond the need to advance by stages to the goal. Congress let us go only part way, but the part way, when administrative will was undeviating, proved to be enough. Often the administrative will was not undeviating, often the administrative resourcefulness was not enough, often and Gulliver's threads of the land allotment system and of civil service and the appropriation systems kept the administrator imprisoned. The establishment of living democracy, profound democracy, is a high art; it is the ultimate challenge to the administrator. The Indian Service since 1933 has practiced the art, has met the challenge, in ways varied enough and amid situations diversified enough to enable one to give a verdict which seems genuinely momentous: the democratic way has been proved to be enormously the efficient way, the genius-releasing and the nutritive and life-impelling way, and the way of order.

J. Collier, Indians of the Americas, 155–56 (abr. ed. 1947).

[53] *Supra* note 33.

[54] *Supra* note 33.

What now must be examined, in the light of the expressed federal policies of self-determination, is the role and value of charters and constitutions in Indian governments as they relate to the principles of self-government. In spite of the then underlying federal policy of absorption of Indians into the American mainstream, the IRA was tangible proof of modified federal policy, viz., that Indian tribes should have the option of existing as separate governmental entities. In theory the tribal constitutions and corporate charters were to be complementary, the Constitution providing the framework for government and the corporate charter the vehicle for economic development. In practice this division of function is rarely a reality. The need for corporate charters as economic development vehicles disappeared as tribes found or were forced to use alternative means to develop. John Collin believed that a tribal charter would enable tribes to carry out most of the activities affecting their own resources which the Bureau of Indian Affairs then performed. [56] While the IRA charter as a means of economic development may now be anachronistic, the policy of tribal economic development and greater self-government through use of tribal contracting is not.

One can see that the two major thrusts of the IRA, i.e., continued recognition of self-government and restrictions on the exercise of federal plenary power, not only should be retained but are absolutely necessary if Indian tribes are to continue to exist as separate cultural entities with defined rights of political autonomy. Conversely, there are portions of the Act which are at best anachronistic, such as secretarial discretion [57] and the corporate charters. [58] But since the law is a seamless web and since Indian law is the most seamless of all, to simply strike any portion of Title 25 by means of legislative amendment may result in unforeseen consequences particularly in relation to the trust obligation of the United States to Indians and the further extension of general discretionary power over Indians that resides in the Secretary of the Interior.

The role of the Secretary of the Interior in approving constitutions and amendments as provided for in section 25 U.S.C. § 476 is not without controversy. The Secretary's absolute unchallengeable [59] veto power over constitutions and amendments when provided for in the constitutions of IRA tribes is viewed by many tribes as being the worst example of the paternalism of the trust relationship. One may make a credible argument that at the time of the passage of the IRA Secretarial discretion was needed because of the underlying educational goals of the IRA, viz., to educate Indians to the genius of democracy and to keep tribes on the path of democracy, and because the United States had to insure that no tribe would establish a Constitution that would violate fundamental precepts of the Anglo society. [60]

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[55] J. Collier, A Birdseye View of Indian Policy, Historic and Contemporary (mimeo 1935). Collier summarizes the tribes' powers under a tribal charter as follows:

1. The general power to make contracts binding upon the tribe for the future.
2. The power to lease tribal land or to grant permits for the use of tribal land without Departmental approval.
3. The power to receive money due under any leases or contracts which the tribe may make, and also money received as profit from any tribal enterprises, and to spend such income for the benefit of the tribe or to distribute such income per capita among the members of the tribe.
4. The power to sue for the protection of its rights, and to be sued, if the tribe violates the rights of its members or of any outsiders.
5. The power to carry on business as a corporation.
6. The right to borrow money from the revolving fund set up under section 10 of the Indian Reorganization Act and to use money so borrowed for tribal enterprises or for loans to cooperative associations and individual members of the tribe.

Cf. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1970).

[56] John Collier M letter (in office).

[57] 25 USC § 476.

[58] 25 USC § 477.

[59] *Twin Cities, Chippewa v. Morton.*

[60] Collier, Indians of the Americas.

But today none of these reasons are viable. The concept of tribal self-determination is circumscribed by limiting the perimeters of tribal conduct. One of the unforeseen aspects of the Indian Civil Rights Act should be the effect it has on the federal government's role as guardian. Prior to its passage acts of tribal governments were immune from judicial scrutiny because of sovereign immunity [61] or if sovereign immunity did not prohibit the action, because of the principle that the United States Constitution was not applicable to tribes through its original enactment or through the fourteenth amendment. [62] Therefore tribal conduct, even if subject to judicial scrutiny, was to be held to the constitutional standard. Because of these two concepts, tribes were free to conduct their internal affairs in any way they wished even if such conduct, if done by the federal government or the states would violate the most fundamental prohibitions of the Bill of Rights. [63] This exemption from constitutional restraints, which was in full bloom in 1934, forced the United States, for moral reasons power over the limits of tribal some control in the form of Secretarial approval power over the limits of tribal conduct as it related to tribal organic documents. Therefore, the Secretarial approval power functioned not only as an educational process but also as a form of judicial review.

This process insured that no tribe could through its constitution or by law enact provisions that would be repugnant to the federal Constitution. But with the passage of the Indian Civil Rights Act and its explosive subject matter jurisdictional expansion,[64] the need for Secretarial discretion was reduced to an educational function, a dubious function at best. The function of Secretarial discretion was to regulate within broad boundaries the relationship between tribal government and its constituents. But with the passage of the ICRA, this function was no longer necessary. One may perhaps better understand this in the context of hypotheticals. Assume that a tribe has an ICRA Constitution and that the Secretary of the Interior must approve amendments. The tribe wishes to amend the Constitution so that property belonging to individual members living on the tribe may be seized without compensation when the tribe determines that it is to the tribe's interest to make such a taking. Surely the Secretary would disapprove such an amendment since it flies in the fact of the 5th Amendment to the U.S. Constitution. But if discretion were removed, leaving the decision up to the tribe as to the propriety of laws, any individual injured by such an action would still be free to challenge the proposed change in a federal court under the ICRA.

While there is a substantial element of the Indian population that would decry the use of the ICRA to challenge tribal authority, because they believe, not without justification, that the act is evil and is designed to foster termination, the realty is that the act will not be repealed. And if the experience of the theocratic pueblos of New Mexico offers any guidance, the ICRA will not be modified to exclude any particular group of Indians, regardless of the strength of their argument. Given this proposition, it would appear to be beneficial for tribes to use the existence of the act as a lever to remove at least one aspect of control that the United States has over the structure of tribal government.

The mere removal of Secretarial discretion from the IRA would not be enough to insure freedom of self-government; it would also require that the exercise of powers under 25 U.S.C. § § 2[65] and 81[66] be curtailed in some manner. By looking at the experiences of tribes who have specifically rejected the IRA, such as the Navajos, one finds that the Secretary of the Interior through his agents and the Commissioner of Indian Affairs have assumed power to approve or disapprove many tribal actions. While there may be some justification in doing this under the trust rubric to retain financial responsibility for breach of trust, the use of such power ignores the fact that a principle of self-government is the right to make errors. Perhaps one way of preventing the spread of the prevasive power of the Secretary over tribes, once the IRA approval power is removed, is to extend the restraints on the exercise of federal power that exist in the IRA to all tribes coupled with an increase in Federal restraints. If this were accomplished, the foundation of federal administrative powers would be undermined, forcing the Secretary, if he wished, to continue this exercise of power to go to Congress and obtain specific authorization. Many areas in §§ 2 and 81 are at odds with contemporary policy and the continuation of this broad grant of power to the Secretary of the Initerior is clearly at logger heads with the theory of self-determination.

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[61] Native American Church and Navajo Tribal Council.

[62] *Talton* v. *Mayes*, 163 U.S. 376 (1896).

[63] Sen. Subcomm. on Const. Rts., 89th Cong., 2d Sess. Comm. Print 8 (1966).

[64] Ziontz, "In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act," 20 S.D.L. Rev. 1 (1975).

[65] 25 U.S.C. § 2. *Duties of Commissioner:*

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

[66] 25 U.S.C. § 81. *Contracts with Indian Tribes or Indians:*

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him or any other person in consideration of services for said Indians

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Since the IRA was an attempt to return federal Indian policy to recognition of the continued existence of tribal government, partially because of the legitimate existence of government, any proposed changes with the IRA must be discussed in light of the current status of tribal governments in relationship to concepts of self-government. One of the distinguishing aspects of the federal Indian relationship has been the periodic appearances of troughs of "benign neglect". After each of these periods it has been necessary for a series of cases to reexplain the political status of Indians to whomever happens to be the protagonist of the hour. Since the resolution of disputes in courts of law—a general issue to be resolved between two parties—often the language of the cases discussing tribal sovereignty are not in terms of self-government but in terms of jurisdiction. The pervasiveness of the trust concept in the late 19th century often hid the self-government aspects of Indian tribes. Starting with *U.S.* v. *Kagama*, in which the court in upholding the power of Congress to enact the Major Crimes Act found the power not in specific grants in the Constitution under the Commerce Clause or the War powers but in the Christian obligation to protect those whom you have made weak and out of the obligation came the power.

In effect the Court found that there was a trust power that was a legitimate source of Congressional power over Indians. A power not confined by the restraints of the Constitution. From Kagama until the IRA the major thrust of federal activity was exercising this newly expanded trust power, for good

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(Continued)

relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or things, under laws, or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation: and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

and evil. For example it provides the basis for exempting Indian personality from state tax by finding that state tax the property to be taxed were federal instrumentalities designed to carry out a federal obligation of trust and to tax would interfere with this policy. While on the other extreme it allowed Congress to enact legislation taking Indian property that would have been outside of the Indian context a clear violation of the fifth Amendment to the Constitution. The court allowed this on the basis of the relationship of the United States to its ward was a political problem.

After this case, considered by some the low point of Indian law, cases delineating the degree of tribal self-government became almost non-existent. While the reasons for this decline are manifold, two world wars, the great depression and the pre-occupation of the white majority in transferring Indian lands to non-Indian ownership, the principle was never seriously challenged although systematic exceptions were evident. It was not until the 1950's that the issue of tribal self-government again became an issue for determination by the courts, except that the issue was framed in terms of jurisdiction rather than self-government. Too often discussions of Indian jurisdiction degenerate into a maze of intricate legal, political, sociological discussion, but before this one sinks beneath the foam it may be of some value to discuss jurisdiction not in terms of specific exercise of tribal power or is more often the case prohibitions of state power but how the important recent cases on jurisdiction relate to the concept of self-government as an integral part of the American structure. During this era one must remember that the federal government had attempted to use the states as vehicles of termination and assimilation for some tribes and the general political philosophy of termination had put the status of Indians into a state of uncertainty. But the court instead of going along with a general political philosophy of termination that appeared to dominate the executive and to some degree the legislative branches of government chose instead to reaffirm tribal self-government.

The three most important cases all arose between members of the Navajo Nation and the state of Arizona and while the factual issue in dispute varied the legal issue was precisely the same, what is the limits of the States power on an Indian reservation. *Williams* v. *Lee* involved a non-Indian trader on the Navajo Nation who brought an action on a debt owed by a Navajo client, incurred on the Navajo Nation, into state Court.

The Navajos attacked the courts jurisdiction on the basis of *Worcester* v. *Georgia*. The Supreme Court upheld the Navajos challenge but in doing so changed the rules of the game as between the United States, the States and the tribe. Under a pure interpretation of Worcester the state in order to have the power to adjudicate the debt would have to find a specific grant of power from Congress but instead the court chose to say, absent a governing act of Congress the crucial inquiry is whether the states act infringed on the tribes right of self-government. This articulation of what has become known as the infringement test had great importance for tribal government for while it was a reaffirmation of self-government in the face of strong terminationist conduct by the other branches of government. Infringement implied that there was a realm of state power that existed without federal approval, e.g., those areas that would not interfere with self-government, an imprecise term at best. After Williams the right of self-government would still exist but the scope was seriously threatened.

In 1965 the Court attempted to explain what the new relationship between the entities would be with Williams as the new bottom line. Arizona had levied a 2% gross receipts tax on business on the reservation. Warren Trading Post a federally licensed enterprise challenged the states power to levy such tax. Appellant based the challenge on two separate theories, that the Commerce Clause prohibited the attempted tax or that the state tax was inconsistant with the comprehensive congressional plan to regulate trade and intercourse among the Indians, e.g., that Congress had preempted the field or the Congressional plan to have Indian reservations govern themselves. The court declined to address the Constitutional issue and specifically held that the regulation of federally licensed traders was an area of federal preemption.

The third case is *McClanahan* v. *Arizona Tax Comm'n.*, where the court in an unanimous decision struck down Arizona's attempt to levy state personal income tax on Indians living on the reservation deriving income from reservation sources. McClanahan stressed the Indians right of self-government as exemplified by the numerous treaties and statutes dealing with Indians as a source of freedom from state incursion. The major importance of McClanahan was, it clarified contemporary guidelines for the exercise of tribal power vis-a-vis the state. In effect these three cases provide the conceptual framework for codification of the scope of tribal power. The power of tribes—absent a governing act of Congress—may be broken down as follows:

(1) Tribal power is exclusive over activities of Indians on the reservation.

(2) When there is a non-Indian interest, the tribes right to regulate may be concurrent with the states. The extent of concurrent power is determined by the state/tribes jurisdictional powers which involves an interest analysis approach. The states power exists only if the claimed right to be exercised does not interfere with the tribes right of self-government.

A codification of Indian status re the states is an extremely significant project. The theory of codification is that there is no substantive changes in the law and in most instances this is a true statement of intent but to codify Indian Civil status is not without its dangers, particularly since the major protection of Indian rights has not been the legislature but has been the courts. The normal rule for codification is that if one wishes to make the existing law more difficult to change then one should codify the law, change outside of statutory construction then entails an affirmative act of the legislature, whereas without codification the law is subject to change by judges. Codification then would in the normal system make change much more difficult to achieve but the unique aspects of Indian law make codification because of this precise reason dangerous. Traditionally in America it has been the federal judiciary that has served as the major protection for minority rights. The independence of the judiciary allows them to be relatively free from the political pressures entailed by elections. When one contrasts the performance of the state judiciaries with that of the federal ones he finds that states that have elected judiciaries have been reluctant to make unpopular decisions. Of course there are benefits in codifying the contemporary law on jurisdiction, one it would freeze the law at a relative high point for Indian self-government. This must be offset with the danger of setting out the full range of powers by tribes before a body that has historically been disfavorable to Indians.

The major benefit of codification would be to make clear the jurisdictional relationship for courts. To codify the jurisdictional status along the lines set out in the body after McClanahan and Williams would at a minimum provide guidelines for lawyers involved in Indian litigation. While the codification should have no affect on actual jurisdiction since the federal common law as to Indians would simply be adopted, setting out the precise relationship may have political consequences. Once codified, the way is paved for simple Congressional legislation to remove whole areas of Indian jurisdiction by statute, e.g., over non-Indians, while Congress could do this now under existing authority the difference in doing it on its own initiative and as part of a codification scheme is significant.

The second major area of present concern that may be codified involves tribal power, the best and most comprhensive exposition of these powers was written in 1934 in relation to the Indian Reorganization Acts language in 476 "powers vested in any tribe or tribal council by existing law". While the powers that Solicitor Marigold enumerates is extensive and is derived from the concept of reserved powers rather than granted powers, the listing of powers highlite the very weakness of such an approach. Conspicously absent from the powers vested is the power over non-Indians, a concept inconveivable in 1934. While one can argue as a matter of law that the power of tribes is not limited by enumeration, that this would only be spelling out in greater detail existing powers with a saving clause similar to the one in the IRA, the advantages of codification appear to outweigh the disadvantages and making it statutory is not a guarantee of permanency. One thing that ought to be obvious to Indians is the transience of promises even when they are laws.

Appendix VIII.—Analysis of Administrative Discretion of Secretary of Interior Regarding Delegated Authority Over Indian Tribal Trust Resources and Income

On the Pennsylvania Avenue side of the Department of Justice building in Washington, D.C., is engraved the following words: "Where law ends, tyranny begins." Kenneth Davis has written in response to that: "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." In recommending that 25 U.S.C. Section 476 be amended so that the Secretary of Interior shall have no discretion to disapprove any tribal action enacted pursuant to tribal powers recognized by the United States, except those that directly affect the trust responsibility, is an easy recommendation to make and an extremely difficult one to implement. The United States owes a trust obligation to Indian tribes. The extent and nature of this trust obligation is the most vexing problem of Federal Indian policy. While it has been the linchpin of the relationship between the Indians and the United States ever since it was first articulated in *Cherokee Nation* v. *Georgia*, its precise nature is amorphous. Trust obligation implies that the United States has a fiduciary relationship to Indian tribes. Implicit in this fiduciary relationship is the principle that the trustee has discretion over management of the trust. While it is clearly beyond the scope of this Task Force to engage in any examination of basic trust theory, it must be noted that the trust is the crux of the relationship and without the trust existing in some form, Indian tribes would cease to exist as units of semi-independent government.

Indian attitudes about the trust relationship and discretionary powers pursuant to the relationship are bittersweet. Clearly, without discretion one may not have a trust. There is no management left, but some form of trust relationship must exist or tribes may not exist as separate units of self-government. And, in fact, any mention of terminating the trust relationship is viewed with abhorrence by Indians. Indians well remember the last major experience of eliminating the trust relationship, an experience that resulted in extinguishing the existence of some tribes as legal, political entities. The problem then is not to have a trust, but instead how may Indians lessen the broad discretionary powers of the Secretary of the Interior as granted to him by Congress, while at the same time maintaining a relationship that in the end would impose liability on the United States for breach of fiduciary obligations. In order to determine what should be the proper role of the Secretary of the Interior on approving or disapproving tribal actions, clearly he must maintain power at some point.

This paper will examine: (1) The scope of discretionary power that should reside in the Secretary of the Interior for approving or disapproving tribal actions; (2) what policies should guide the Secretary of the Interior in making these decisions; and (3) what administrative devices should be implemented for consigning and structuring the exercise of discretionary powers. Discretionary power exists whenever a public officer, in this case the Secretary of the Interior, is delegated by law to make choices among possible courses of action or inaction. Of course, these choices must be those within the effective limits of his power. One important fact must be emphasized. In the discussion of discretion, one assumes that the Secretary is acting within the confines granted to him by Congress, and he is not making either illegal or questionable choices.

In Federal Indian policy, this is extremely important because it appears that the power of the Secretary of the Interior to make discretionary choices has been greatly abused. Professors Monroe Price and Reid Chambers have noted that "a basic flaw in Federal Indian policy * * * is its shapelessness, its potential for arbitrariness and uncertainty, attributable in large part to the vast discretion of the Secretary." It is extremely important, then, to examine the scope of the function and policy of discretion, because those choices *lawfully* made under discretionary powers are unreviewable in any forum. Fortunately, Secretarial au-

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thority is not limited to absolute alternatives, e.g., a return to the most oppressive wardship doctrines that existed in the 19th Century, characterized by *United States* v. *Kagama* and *Lone Wolf* v. *Hitchcock*. In this period Felix Cohen has delineated at least ten different areas in which the concept of guardian, ward or trusteeship was used. These range all the way from approving or disapproving individual Indian conduct in the normal course of human activity to abrogation of treaty rights under a rubric of "political question". While there are no absolutes in Indian policy, there is a high probability that this type of oppressive wardship will not be reimposed.

The other extreme, termination of the Federal trust responsibility, will also not be discussed in great detail. The reasons are self-evident. If there is no trust relationship, one is not concerned with the problems of discretionary powers and the adequacy of judicial review affects tribal decisions.

The first step that should be taken to limit the abuse of Secretarial discretion should be by defining specifically the areas in which discretionary powers exist. This may be done by amending 25 U.S.C. Section 2 to include language that the Secretary of the Interior shall have no discretion to approve or disapprove activities of tribal government except when those activities involve trust assets. Secondly, 25 U.S.C. Section 476 should be amended to say that the Secretary of the Interior shall have discretion to approve or disapprove tribal activities only as prescribed in Section 2. While there is no adequate working definition of trust assets over which discretionary power should still exist, it would probably include, at a minimum, tribal resources, particularly land, minerals, timber and other natural resources. Professors Price and Chambers have suggested that "the trust responsibility could be read as placing the highest value on the Federal guarantee of space immune from state intervention where Indian society can be pursued."

It is important to note that this does not involve any Federal activity in determining what types of culture ought to exist on the reservation. In fact, its focus is that the United States should function as a protector of the Indian "right to be different" in a pluralistic society. If one takes this definition and applies it as the minimal limits of discretionary power resources, it leaves one with two possible approaches to the exercise of this residual discretionary power. The first would be to limit the Secretary of the Interior to an extremely small role involving anything properly done by an Indian tribe. His sole function would be to act as a guardian or a bodyguard of those assets necessary to ensure the Federal guarantee of space immune from state intervention. But his discretion would exist only as to what course of action he would take once the tribe requested that he act. In effect, once an Indian tribe has made a lawful decision, a decision that is consistent with the appropriate tribal codes, ordinances and other Federal restraints on tribal power, the Secretary would have to carry out that decision if requested. His sole function would be that when there is a threat to Indian property from the outside, be it state or local government, the United States would then defend and protect the tribe's interest. This would only be done upon an affirmative request from the tribe. In effect, all matters the tribe could possibly engage in are solely the tribe's prerogative, and the Secretary would have no power to disallow any tribal action.

The problems with this approach are largely self-evident. There is little protection for minority political or cultural factions within the tribe. In tribes that have large non-resident enrollments, the resources could be exploited or the land could be alienated, destroying whatever base for cultural separateness may exist for those residents who wish to live on the reservation. It also would have a tremendously dangerous psychological effect because it would instill an attitude that there no longer would exist any affirmative obligation of the United States to Indians. It would not be hard to conceive that Federal policy would quickly turn into termination.

The second possible alternative for Secretarial discretion would include the protective bodyguard aspects of the first but in addition would leave the Secretary power to disapprove certain types of tribal actions. Disapproval would be limited to those situations that would endanger the continued cohesiveness of the tribe and its culture. Secondly, they would be limited exclusively to actions relating to disposition of tribal trust assets. Restricting the Secretary's authority to matters affecting tribal assets would reflect the recognition of an overriding authority over tribes in the Federal courts to approve or disapprove tribal actions pursuant to the Indian Civil Rights Act.

The Secretary, in exercising his approval power, or conversely, his disapproval power, would do so with the goal that Professors Price and Chambers have articulated, e.g., a guarantee of space where tribal society can be pursued. While the Secretary in making decisions pursuant to his power should not be unaware of the considerations of the distinct aspects of Indian culture, the power should not be used to preserve culture in a fixed period. Indian societies must be allowed the opportunity to grow and develop as any other social organization, the distinction being that the type of growth and change should be determined by the tribe rather than the United States government. While this approach would greatly curtail the theoretical power of the Secretary of the Interior, it would in reality make little difference on the actual practices presently used. The different approaches to scope would entail different consideration in order to resolve specific issues.

Assume that a tribe is offered the opportunity to lease 30% of its reservation for a new town development. The development will be in an area that some members of the tribe believe sacred. Further, assume that the tribe has lawfully complied with its own procedures to effectuate the transaction. Under model number one, the Secretary must approve the transfer. Under model number two, whether or not it would be approved would turn on whether in his discretion the lease would be contrary to the concept of "life estate" set out in the guide for making discretionary decision. This decision would not be reviewed in either case. But regardless of how one defines the scope of discretion, one is still left with an ultimate unchallengeable power in the Secretary of Interior to make decisions.

Fortunately, there are means by which one may regulate the exercise of discretion. Two broad areas of control are present, confining and structuring discretion. Confining in the situation above is the process of narrowing the areas in which discretion is exercised, limiting power solely to tribal actions that affect trust property. This may be further accomplished by requiring promulgation of administrative rules on the part of the BIA or Secretary of Interior relating to their authority over trust resources, resulting in further restraints on Congressional grants of power.

When combined with structuring, it gives the tribe knowledge of the process by which a decision was made. Structuring is the process of controlling the manner by which administrative discretionary power is exercised. Discretion may only be challenged on procedural points. In Davis' Discretionary Justice, the key to limiting discretion is with openness. When the informational process by which a decision is reached is combined with stringent procedures, the capacity to make unjust or arbitrary decisions is greatly diminished. What should be required as a minimum in order for a tribal decision to be vetoed, even those affecting trust assets, would be a hearing in which the tribe could present its side, or if impractical, since these are usually not competing entities, at least a full opportunity to be heard. But regardless of which method is used, the Secretary should have to publish or at least make available findings of fact as to why a decision is being made. Furthermore, the reasons for the decisions should also be made.

The distinction between reasons and fact are important since this should infuse some element of consistency and provide area for judicial review. All of this increased process should be accomplished by more substantial rules as to the procedure, since the only way to really control discretion is by insisting that proper procedures are adhered to.

A second issue deals with retention of Secretarial discretion; that is, to whom is the trust obligation owed? This question arises in two separate contexts: first, a tribe in which there are two competing interests for political power; secondly, when there is a problem as to which group of people is the tribe itself.

In hypothetical situation number one, assume that there is a tribe that is split, e.g., some members of the tribe allege that they are the legitimate governing body of the tribe and further allege that the other group which pretends power does so because of violations in election laws, changes in constitutions, ordinances, bylaws, fraud, corruption, graft, or whatever reason one cares to name. While the the so-called aggrieved parties could file an action in Federal district court under the Indian Civil Rights Act to resolve the dispute, this can be a costly, time-consuming process, during which time the tribe could possibly suffer disastrous consequences. In circumstances like this, the Secretary of the Interior, after making a determination that there is no way internally for the tribe to resolve the dispute, could administratively determine which group is legitimately in power pending outcome of the litigation. This type of solution would also be applicable when conceivably a Federal district court would find no jurisdiction existing under the Indian Civil Rights Act.

The second problem is much more difficult because, unlike the first hypothetical where there is no dispute as to who the tribe is and the dispute is solely over who is in control, in the second circumstance, the fundamental issue is what group is the tribe. Obviously, in this circumstance there cannot be a remedy under the Indian Civil Rights Act because before one can file an action under the Act, it is necessary that there be a tribe that is violating an enumerated right. While theoretically one could file an action against a group denominating it a tribe, this obviously would defeat the purpose since it would be an admission that the other in power in a tribe. In these circumstances, it is encumbent upon the Secretary of the Interior to make some ruling as to who legitimately belongs to an Indian tribe. These are not easy decisions, given the broad range of membership possibilities that occur in the numerous Federally-recognized tribes.

Appendix IX.—Impact of the Indian Reorganization Act on the Governmental Functions of the Pueblo of Laguna

IMPACT OF THE IRA ON THE GOVERNMENTAL FUNCTIONS OF THE PUEBLO OF LAGUNA

What impact did the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) (hereinafter referred to as the IRA) as subsequently amended, have on the governmental functions of the Pueblo of Laguna? How does the Pueblo of Laguna function under the IRA?

Historical perspective

On the San Jose River, forty-five miles southwest of Albuquerque lies the Pueblo of Laguna. Founded after the Pueblo Revolt of 1680 by Keresan peoples from the pueblos of Ceneguilla, Santo Domingo, and Cochiti,* Laguna soon became more important than its famous neighbor, Acoma. It is the only pueblo now existing that has been founded since the advent of Europeans into New Mexico,[1] Since the latter part of the 17th Century, the Pueblo of Laguna has had to deal directly or indirectly with foreign governments. These early dealings with foreign governments and Laguna's own structured system of government formed the bases of the present day sophisticated governmental entity. The basic task of the Pueblo of Laguna during the late 17th and 18th centuries has been to regain the lands it recognized as its own. Thus, from their original holdings confirmed by the Spanish as a grant four leagues, measured one league in each of the four cardinal directions from the door of the old church, the Lagunas have acquired by grant, purchase, and executive order, 269,879 acres of land.[2] Most recently, the Pueblo of Laguna voted to acquire a neighboring ranch that will add approximately 29,000 acres to Laguna's existing land base.[3]

In 1863, Abraham Lincoln, President of the United States of America, recognized and confirmed the right of the Pueblo of Laguna to govern itself, and solemnly pledged the full faith of the United States of America that the customs and land rights of said Pueblo, and the liberties and religions of its members, should forever be protected by the United States of America and forever remain inviolate. As evidence of said recognition, confirmation and solemn pledge, President Lincoln gave the Governor of Laguna Pueblo a cane, which has in the course of years become the staff and symbol of the office of Governor or said pueblo.[4] Thus, while the United States was negotiating treaties and other arguments with other Indian tribes, it has simultaneously recognized and affirmed Laguna's form of government.

Several factors influenced the structure of Laguna's government. Among the influential factors were the educational backgrounds of its tribal members. Carlisle Indian School was established in 1879 by Captain Richard H. Pratt.[5] From its doors emerged many young Indian men and women who had learned the English language, had become acquainted with the American system of government and who had traditional Pueblo Indian backgrounds. Among these young Indians were several members of the Pueblo of Laguna. They were among persons who would draft the "Laws, By-Laws, and Constitution of the Pueblo of Laguna" that took affect in 1908. Thus, 26 years prior to the enactment of the IRA, Laguna Pueblo had expressed its democratic form of government.

The introduction of the provisions of the IRA to members of Laguna Pueblo was made via teams comprised of Bureau of Indian Affairs (BIA) employees, who in some instances were also tribal members or closely affiliated with the Pueblo, and tribal officials. They were to explain and interpret the provisions of the Act. Naturally, after witnessing and hearing of the genocide and gross inequities brought on neighboring Plains Indians, members of the Pueblo were very skeptical about ratifying any Act of Congress. After several months of explanation and debate the tribal members voted to come under the provisions of the Act on October 27, 1934 by a vote of 776 (yes votes) to 6 (no votes).[6] What Laguna people remember most about the IRA is the mass slaughtering of sheep and cattle that took place according to section 6 (Conservation of Indian Resources) of the Act.

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*This is an anthropological finding and not the true origin of Laguna Pueblo according to oral tradition.

[1] Brayer, "Pueblo Indian Land Grants of the "Rio Abajo," New Mexico (1939)," p. 32.

[2] Brayer, supra, p. 46.

[3] Tribal Referendum held on March 6, 1976.

[4] "Amended Constitution and By-Laws of the Pueblo of Laguna in New Mexico (1958)," p. 1.

[5] Bureau of Indian Affairs, "Indian Tribes, Bands, and Communities Which Voted to Accept or Reject the Terms of the Indian Reorganization Act, the Dates When Elections Were Held, and The Votes Cast," (Tribal Relations, Pamphlet 1A) (September 1946), p. 6.

It can be argued that undue influence was used on the illiterate and uneducated members of the tribe. Among older tribal members today, there is still some discontentment as to the manner in which the IRA was presented to them for consideration. However, the results of the secretarial election and the Pueblo's subsequent ratification of the "Constitution and By-Laws of the Pueblo of Laguna in New Mexico" in 1949 can be asserted prima facie evidence of the IRA's acceptance among members of the Pueblo of Laguna. It should be noted that eighteen of nineteen Pueblo tribes in New Mexico voted to go under the IRA. Jemez Pueblo voted not to go under the provisions of the IRA. Subsequently, only four pueblos including Laguna, Santa Clara, Isleta and Zuni have adopted Constitutions pursuant to section 16 of the IRA of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378). Thus, no pronounced impact can be demonstrated as per the pre-existing governmental structure of Laguna Pueblo.

Tribal governing structure

The Tribal Council is composed of the following elected officials: Governor, 1st Lieutenant Governor, Second Lieutenant Governor, Head Fiscale; First Fiscale; Second Fiscale, Treasurer; Secretary; Interpreter; and representatives from the six recognized villages of the Pueblo of Laguna. The Officials, except the village representatives, are considered the Staff Officers who are in effect an Executive Cabinet. The line of authority is given seriately during the absence of the Governor. The IRA, according to several Laguna tribal members and officials, merely served to document Laguna's pre-existing form of government that exhibits elements of Spanish influence.

The Governor acts as the chairman of the council meeting where an agenda, outlining the topics for discussion and consideration, is followed. The topics range from investment planning to the hiring and firing of tribal employees. The Council acts as a business enterprise, social services agency, legislature, personnel department, etc. The above roles indicate only those roles that I have seen the Council fill thus far in my research and observation.

Council meetings are held once a week to consider the business of the Tribe and sometimes twice a week when matters of urgency arise. An average of ten topics for discussion and consideration appear on the agenda, but the number of items discussed and decided on vary with the complexity of issues. There are no formal rules governing the conduct and procedures of Tribal Council meetings or the councilmen. The only guidelines are briefly set out in the Tribal Constitution and By-Laws.

Every village is represented on the staff (Executive Branch) by at least one individual, and could be represented by as many as four individuals. Thus, one village could be represented on Council by six individuals. Despite the possibility of antagonism, there is no history of such an election. There are a total of 21 voting members in the Tribal Council (6 villages, with 2 representatives for a total of 12, and 9 Staff Officers).

Organization of tribal administration

The Council has 11 standing committees which are made up of people from the Council, but the majority of the members are from the community. The standing committees are: Budget Committee; Community Health Representative Committee; Laguna Elementary Advisory Board; Scholarship Committee, Land Claims Committee; Finance and Planning Committee; Board of Trustees (Minor's Trust Account); and the Membership Committee. The Planning Commission is presently funded by the Economic Development Administration, and is charged with developing plans, writing proposals and negotiating with Federal agencies for the overall economic development of the Pueblo of Laguna. Their task is perhaps the lifeline of the Tribe's future. Their authority to conduct negotiations on behalf of the Pueblo has recently been extended so as to prevent any unnecessary delays in obtaining funding. Prior to obtaining this extension of authority, the Committee had limited authority in relationship to its tasks and working time. Basically, the standing committees have authority until their decisions are reviewed by the Tribal Council, at which point the Council is in complete control. Nothing is done without the final review and approval of the Council.

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[6] Dennis, "The American Indian 1492–1970," (1971), p. 41.

Relationship between the staff officers and tribal council

The relationship between the Tribal Council and the staff officers is immediate and interdependent. The concept of separation of powers is not applied in the Laguna Pueblo system of government. The Governor only votes in cases of a tie vote, whereas the other staff members are voting members of tribal council. In effect, the Governor, Secretary and Treasurer act as discussion leaders who explain facts of the various topics under consideration and guide the Council in their decision making process.

Actual structure vs. documented structure

The self-government powers enumerated in the Tribal Constitution and Ordinance are carried on to the very extent that they are written. The powers and duties outlined in the Constitution are general and include many areas. In effect, the Council acts as a Department of Health, Education and Welfare, Department of Labor, Department of Justice and other agencies designated to promote the general well-being of tribal members. The structure is understood by council members and is for the most part respected by tribal members. The objections to the present system lie in the slowness of processing business through the Tribal Council. This slowness can be attributed to the bureaucratic red tape that the Council must go through prior to making a definitive decision. The Federal program proposal process retards the action that the Tribal Council can take. Also, the outside consultants that the tribe hires have to consult with the Area Office on certain matters. A major bottleneck appears in the requirement that the Secretary of the Interior approve many of the decisions and activities that Council engages in. The past is scarred with hasty decisions which were definitely not of the careful, analytical character that is the style of many Indian councils. Today, members of Councils are careful to understand the substance of every issue. Outsiders are quick to criticize the process, but after a subjective look at the backgrounds of the councilmen and the magnitude and complexities of the decisions they have to make, one tends to have a different perspective.

Plans for revision of the tribal constitution

Under previous tribal administrators there was a movement to revise the 1958 constitution. A revised and amended constitution has been pending before the Council, but other urgent matters have superseded its consideration. It should be noted that Laguna Pueblo had a written constitution at the turn of the century (1908). The 1908 constitution was revised and amended in the 1940's pursuant to the IRA and the constitution was ratified and approved in 1949. Again, in the mid-1950's there was a need to revise and amend the 1949 constitution. Out of this third revision came the 1958 constitution which the Pueblo of Laguna presently abides by. The latest revision was accomplished by means of a committee comprised of members of the Tribal Membership Committee, consultants who had expertise in the revision of tribal constitutions, a representative of the Secretary of the Interior, and tribal attorneys. The pending revised and amended constitution has already drawn some criticism and will probably not be approved during this administration. The urgency of approval is dependent on the attitude of the particular administration. This is the case in many matters of importance.

Conclusion

Thus, the IRA did not have a pronounced impact on the Pueblo of Laguna. The relative governmental sophistication and the foreign relations background of the Pueblo of Laguna in existence when it considered the IRA and voted to come under the provisions of the Act downplayed any significant impact. Today, the Pueblo of Laguna functions as a democracy not because of the IRA but in congruence with the organizational purpose of the Act.

Appendix X.—Issues in Mutuality—The Existing Relationship Between State and Tribal Courts

ISSUES IN MUTUALITY

(The existing relationships between Tribal and State Courts)

(Submitted by the American Indian Lawyer Training Program, Inc., May 1976)

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Foreword

This report represents six months of research conducted by the American Indian Lawyer Training Program (AILTP). Participating in the research effort were Indian law students who took part in AILTP's Indian Law Seminar and Intern Project for the summer and fall of 1975. The interns were supervised and encouraged by Indian attorneys of the AILTP staff.

The underlying philosophy of the research project was premised upon the firm conviction of the attorneys and law students involved that the Indian legal community has an obvious fiduciary responsibility to tribal governments and

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tribal courts. Those Indians who are fortunate enough to obtain a legal education and experience in the legal profession must realize that a personal duty is owed to their people. Concerted efforts must be made to identify and resolve the plaguing legal issues which face tribal communities across this country.

In the spirit of the above conviction AILTP selected the serious and complex issues involved in the relationship between tribal court systems and their counterpart state judicial systems as the subject matter of this research investigation.

Recently, there has been a tremendous surge of interest in tribal sovereignty and Indian self-determination by Congress, federal agencies, and the media. While this concern may reflect a climate positive for the strengthening of tribal self-government, significant issues remain to be resolved. An effective approach to these issues may be to concentrate on the inefficiencies which are housed in the daily operation of tribal court judicial systems.

An examination of the "multuality" issue from the above approach uncovers facts about the legal rights and responsibilities of tribal courts relative to respective state courts which are more than an abstract legal issue but are critical governmental policy considerations of which all those who are involved in the proper development of tribal governments must be cognizant.

In many of the western states judicial and law enforcement officials display a negative attitude toward tribal courts. As a consequence, state/tribal relationships are not mutual or equal with regard to the recognition and enforcement of official court orders and judgments (tribal courts suffering the inequities). The contributions to this attitude are uninformed assumptions of fact and conceptual error in the interpretation of federal law concerning the power, authority, and status of Indian tribal courts. Unlike state officials, the judicial and law enforcement agencies of tribes have been unselfishly cooperative by recognizing and enforcing state court orders and judgments.

The intern researchers investigated and documented the practices and policies of tribal and state officials which perpetuate the unequal relationship alluded to above. This report probes the contributing issues. An identification of the problem areas is made; conclusions are drawn; and appropriate recommendations are offered.

We extend our appreciation to the intern researchers, sponsoring tribal courts and tribal councils, and several state officials who gave their full cooperation to this research project. We are grateful to Dr. Blue Spruce of ONAP and Dale Wing of LEAA for their support of AILTP and this research. We offer a special thanks to the Gila River Indian Community whose tribal government acted as a conduit for LEAA in making possible this research project.

THE AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC.

I. Introduction

A. BACKGROUND NOTE

This report documents research findings of a team of Indian lawyers and law students on the issue of mutuality between tribal and state courts on selected Indian reservations located in Arizona, Minnesota, Montana, New Mexico, North Dakota, South Dakota, and Washington. The study was organized by the American Indian Lawyer Training Program (AILTP) as part of its 1975 summer Indian Law Seminar and Intern Project. It was funded by grants from the Office of Native American Programs (ONAP) of the Department of Health, Education, and Welfare (HEW), and the Law Enforcement Assistance Administration (LEAA) of the Justice Department.

During the past summer, eight interns assigned to assist tribal courts engaged in field research to determine the relationship between the tribal courts and neighboring county and state courts. The research was directed and supervised by two AILTP attorneys. Student reports with supporting legal memoranda, as compiled and edited by the directing attorneys, make up the substance of this report.

B. THE SIGNIFICANCE OF TRIBAL-STATE COURT MUTUALITY

It is a fundamental legal concept that judgments and orders of federal and state ocurts are recognized and enforced mutually as a requirement not only of the United States Constitution but also of federal statutes and case law. Framers of the Constitution recognized that, due to commerce between states, legal rights of citizens could not be protected unless states were required to enforce official orders and judgments of sister states on a mutual and common basis. Therefore, the concept of "full faith and credit" was embodied in Article 4 of the United States Constitution.

Federal case law has consistently recognized the independent status of Indian tribes in relation to the states wherein they are located The landmark Supreme Court case of *Williams* v. *Lee*[1] affirmed that a state does not have authority (jurisdiction) over cases involving tribal members where the dispute takes place on a reservation. To determine limits of state jurisdiction, courts must determine whether the state action will "interfere with the right of the tribe to govern itself."

In light of this independence it would seem logical to expect "full faith and credit" arrangements to be in effect between the states and Indian tribes. Yet, minimal intergovernmental compacts exist between tribal and state governments. On the contrary, there is continuing confusion regarding the requirements of federal jurisdictional law which perpetuates mutual antagonism and suspicion between tribal and state officials.

It is evident that in the basence of real mutuality between tribal and state governments, injustices for the tribes and tribal members continue. Individuals are not able to enforce their contract rights or other civil remedies where actions involve both tribal and state citizens. In addition, criminal justice can be thwarted where mutual extradition agreements are lacking.

Although states are expressly limited by federal law in the exercise of power over Indian tribes, there are circumstances which lead to expansion of state control over tribes. For example, state taxation laws, fish and game regulations, automobile registration and licensing, etc. all apply to non-Indians on the reservations despite the fact that such state laws are not applicable to tribal members. Often, the effect of such state control is to limit potential for tribal government regulation over identical areas. As a result, tribal officials are reluctant to enter into agreements, formal or informal, for fear that states will gain more "control" on the reservation. On the other hand, state officials generally don't concern themselves with the tribes unless there is a potential benefit to be gained by the state.

The implications of this lack of governmental interaction between tribal and state officials are significant. Inadequate protection of individual rights is encouraged by different applications of law. For example, accidents are often caused on reservations by drivers who are non-members of the tribe. Once across the reservation boundary line, the driver may not be subject to the tribal court's jurisdiction. This leaves the injured party without redress because actions brought against non-members have no effect outside the reservation boundary. Similarly, any state court proceeding against an Indian who resides on the reservation will not be enforceable in the absence of mutual agreements between the two governments. State officials have often referred to the "refuge" aspect of reservations without any thought to the numbers of non-member violators who simply cross the boundary to escape from tribal authority. Obviously this lack of cooperation encourages violators on both sides. More importantly, the result is the extension of existing antagonisms.

II. Legal Aspects of Mutuality

A. RELEVANCE OF FULL FAITH AND CREDIT PRINCIPLES TO TRIBAL/STATE RELATIONSHIPS

A significant reason for the lack of tribal/state court interaction has been the fact that the "Full Faith and Credit Clause" has not been considered applicable to Indian tribes. Article 4, § 1 of the United States Constitution states in part, "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," and 28 USCA § 1738 which codifies the full faith and credit requirements adds "territories or possessions of the United States" as well as the states. The basis for non-applicability of the full faith and credit clause to Indian tribes is therefore based on specific language. Despite early case law holding that tribal court judgments were entitled to full faith and credit, there has been no major federal guidance to reaffirm these decisions. For example, note the date of *Standley* v. *Roberts*,[2] where the Court found "that the judgments of the courts of these . . . nations stand on the same footing with those of the courts of the territories of the Union and are entitled to the same full faith and credit."

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[1] 358 U.S. 217 (1959).

[2] 59 Fed. 836 (1894). See also *Raymond* v. *Raymond*, 83 Fed 721 (1897).

Recently, a New Mexico court found that the Navajo Nation was a "territory" within the meaning of the Constitutional mandate, as codified in 28 USCA 1738, thereby entitling its laws to full faith and credit.[3]

While this interpretation is not without some basis, nonetheless many Indian law analysts feel the decision will eventually be overturned. This doubt is fostered by the New Mexico court's putatively erroneous interpretation of the word "territories" since there has been no other significant authority interpreting the meaning of territories to include Indian tribes.

Regardless of the eventual status of *Jim* v. *CIT*, a decision by a state court is not binding on any other state in the same manner as a federal court interpretation of federal law. Since the case was decided in March of 1975, the full implication of the decision even in the state of New Mexico is not yet clear. In addition to the Navajo Reservation which was the subject of the *Jim* case, the state of New Mexico contains two Apache reservations and nineteen Pueblos each with their own government and court systems. It will be interesting to observe whether all New Mexico courts comply with the decision and award full faith and credit not only to the laws but also to the judgments and orders of the remaining 21 Indian tribal governments located in the state.

B. ALTERNATIVES TO "FULL FAITH AND CREDIT"

It is important to note that under federal law, even if one concludes full faith and credit is not applicable to the tribal/state court relationship, there is nothing prohibiting these courts from granting recognition and enforcement to each other's judgments.

Where tribal or state law does not provide for such a prohibition, judges may employ whatever policy they deem appropriate. In such a situation, the appropriate recognition policy may be "comity." If a party to a lawsuit wishes to resist such a judicially initiated recognition and enforcement of a "foreign" judgment, perhaps the only relevant legal principle would be whether the effect of enforcement is contrary to public policy. For example, a tribe might have a policy requiring restitution to survivors of a criminal homocide while the state might not follow such a practice. A state judge, who would otherwise grant "comity," might not enforce the tribe's judgment under those circumstances. The tribal/state court relationship, regarding comity, depends entirely upon the flexibility and sensitivity of the jurists involved. Of the states wherein research was conducted, only Washington has a statute which provides for enforcement of tribal judgments in civil actions if not inconsistent with state policy.[4] South Dakota has issued an attorney general's opinion concluding that "there is no full faith and credit requirement regarding tribal courts in adoption or any other areas." In Minnesota, Montana, and North Dakota, state law appears to be entirely silent on the question. In Arizona, the State Supreme Court has gone on record as recognizing a tribal court judgment but without specifying the exact legal basis.[5]

C. RELEVANCE OF "COURT OF RECORD" PRINCIPLES

Generally, state judges "recognize" tribal court orders only if they comply with state standards. In effect, they analogize tribal courts to lower state courts where proceedings are not recorded. Generally, lower level state courts are called "police courts," "justice of the peace courts," or "magistrate courts." They are limited to small civil or misdemeanor criminal cases and usually do not require judges to be professional attorneys.

Appeals from these courts require "de novo review," which means that an appealed case is retired completely. Such non-record judgments are therefore not recognized by other states since recognition is granted to final judgments and those subject to de novo review are not "final" judgments on the merits.

Under federal law, tribal court systems are not subject to state standards such as "court of record" requirements even where a state maintains non-record courts within its own system. The full faith and credit requirement of finality disqualifies only tribal judgments subject to "de novo review" by a tribal appellate court. Since tribal appellate systems provide for appeals on issues of law or assignments of error not for retrials, state requirements have no legal application to tribal court judgments. However, hesitancy of state officials to enforce orders of tribal courts which they feel suffer from procedural deficiencies without the recourse of a new trial on appeal is understandable.

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[3] *Allen Jim* v. *CIT*, 533 P.2nd 751 (1975).
[4] RCWA 37.12.070.
[5] *In re Lynch's Estate*, 377 F. 2nd 199 (1966).

Although state standards arguably are not technically relevant to recognition questions, state concerns about protections inherent in record-keeping procedures are certainly relevant to the practicalities of working out state/tribal reciprocity arrangements and therefore were made an important consideration of this research.

III. The Research Project

The research porject was carried out by interns assigned to work with the Gila River Commmunity Court, Leech Lake Conservation Court, Ft. Belknap and Rocky Boys Tribal Courts, Ft. Berthold Tribal Court, Cheyenne River Tribal Court, and Quinault Tribal Court.

The interns were requested to research the state/tribal court relationship in light of two general issues: (1) The status of reciprocity between tribal courts and state courts; and (2) the status of tribal courts relative to state requirements for courts of record.

Reciprocity denotes a mutual interchange of favors and privileges between governments.[9] Essentially, reciprocity is granted upon the condition that the citizens of one government be afforded similar privileges and protections. Usually, reciprocity requires no more than an agreement by both governments to fully recognize the rights and obligations of citizens of the other. The significance of the relationship between the court of record status and reciprocity suggests that the most acceptable approach to the whole question of mutuality must take into account all aspects of both questions.

A. LEGAL ISSUES DEFINED

Specific questions regarding the two general issues were defined as follows:

1. What is the current status of the tribal/state court relationship regarding mutual recognition of decrees and judgments?
2. Are there federal, state or tribal statutes, ordinances, rules of court (i.e., record requirements) or policies that prohibit or discourage recognition of decrees or judgments rendered by the tribal courts?
3. If existing state or tribal statutes or policies prohibit mutual recognition of decrees and judgments for procedural or political reasons, what steps, if any are required for advancement of mutual recognition of those decrees or judgments?
4. What is the status of reciprocal arrangements between the tribes and the states and what recommendations can be made for improvement of the reciprocity situation when change is desired?

B. METHODOLOGY

Interns were placed in areas that would serve to determine the diversity of problems confronting tribes as well as where tribes experienced mutual concerns. The research effort was designed to reveal varying degrees of sophistication attained by tribal courts, as well as the difference in operating structures.

Each intern was required to involve himself with general court work to become familiar with the people and procedures of the tribal court. The interns interviewed state and tribal officials regarding the areas of research, noting their responses.

C. SUMMARY OF RESEARCH FINDINGS: COURT OF RECORD ISSUE

1. Definition

In most of the states examined by the research project, it was found that courts of record are defined or designated to a limited extent by statutes. There are basic attributes generally recognized as characteristic of a court of record.

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[9] Black's Law Dictionary, p. 1485.

Briefly, the coure of record imports verity in its proceedings, records for perpetual memorial, has power to fine or imprison for contempt, and has a qualified judge, a clerk and a seal. Courts listed "of record" are usually the Supreme Courts, the district courts, the courts of appeal, the courts of impeachment, the superior and municipal courts.

2. *Summary by State*

Arizona.—In Arizona the courts designated as courts of record are the Supreme Court, the courts of appeal, and the superior courts. Additionally, it was suggested by certain state court officials that a necessary qualification to the statutory requirement is a "qualified" judge and written legal opinions.

Minnesota.—The courts of record in Minnesota are the Supreme Court, the district courts and the municipal courts. These courts "of record" must have a judge, clerk and a seal.

Montana.—The courts classified as courts of record are the courts of impeachment, the Supreme Court and the district courts.

New Mexico.—The courts which appear to be courts of record are the Supreme Court, the district courts, the courts of appeal, and the probate courts. A further qualification to the statutory designation seems to be that records of judgments, rules, orders and other proceedings be indexed completely and authenticated by a court seal or by signature of the court clerk.

North Dakota.—The courts of record are the Supreme Court, the circuit courts and the county courts.

South Dakota.—Court of record classifications include the Supreme Court, the circuit courts, the county courts, and the city municipal courts. One state statute goes so far as to recognize almost any court created by statute as a court of record. S.D.C.L. 1967, 19–7–1. An additional control device is that records and judicial proceedings may be proved by producing the original records. Authentication by official authority with certificate under seal is also required.

Washington.—The Supreme Court and the superior courts are classified as courts of record. These courts are required to keep complete records of the proceedings and findings of the court, authenticated with a seal.

3. *Student report excerpts*

The following excerpts from student reports illustrate the significance attached to the court of record standards and the status of the tribal courts in relation to those standards:

Arizona.—Gila River Community Court: "The Gila River Community Court would not be termed 'courts of record' under the present standards of the state of Arizona. Arizona courts of record are the supreme court, (ARS 12–101), the court of appeals (12–120), and the superior courts (12–122). The Justice of the Peace courts are not courts of record and a trial de novo is required on appeal. Arizona Const. Art 6, sec. 10. Thus, as was related to me by Superior Court Judge E. McBryde, he would analogize the tribal court to a justice of the peace court. The main reasons being that a written opinion is required by the tribal court and that tribal judges do not hold the same qualifications as state court of record judges. It should be remembered that J.P. courts are not required to have judges who hold a law degree. Judge McBryde noted that the trend is for J.P. courts to have judges with law degrees in Tucson and Phoenix. Ostensibly, the J.P. courts may someday become courts of record. Thus, in his opinion tribal courts may only attain state standards of courts of record by having judges who are legally trained and possess those qualifications of other state judges of courts of record. Under the state standards of court of record, the tribal court decision may be placed on the same level as a J.P. court. However, as I will discuss later, the facts that an informal 'working relationship' exists between the tribe and county in certain areas allows tribal judgments to be granted some type of full faith and credit."

Minnesota.—Leech Lake Conservation Court: "To qualify as a 'court of record' under Minnesota's civil procedural standard, a court must have a 'judge, clerk, and seal.' (*State* v. *Weber*, 96 Minn. 422 (1905), 105 NW 490.) The Leech Lake Conservation Court was established under the authority of the treaty of 1854 and the decision in *Leech Lake Band of Chippewa Indians* v. *Herbst*, 334 F.Supp. 1001 (D. Minn. 1971) and the inherent sovereign powers of the Leech Lake Band of Chippewa Indians. There is no state statute that would require state courts to recognize only those judgments and decrees coming out of courts of record. If a judgement from a court that is not a court of record is appealed, it is usually handled de novo unless the facts do not warrant such review. State rules of court do not prevent the state courts from recognizing decisions of courts which apply record keeping systems that are different than the system applied in the state courts. Proof of official record when attested to by an officer having power to legal custody of the record (Minn. Stat. 44.01) is all that is required for state courts to recognize judgments of courts not considered courts of record. As long as the tribe maintains a system with a clerk of court and structured record system to suit their needs, there is no justifiable reason for the state courts not to recognize the judgments of the tribal court under state rules of court."

"The tribal court does not operate under the state rules of court and procedure as the tribal court has its own tribal code and rules of court. As such the probable barrier to the granting of full faith and credit to tribal judgments would be the hesitancy of the state courts to recognize the tribal courts as having jurisdiction and authority to act as a 'court' without the state's supervision. It would be discretionary that state courts would grant full faith and credit to courts where there is no recording made of tribal judgments other than case and party names, addresses, type of action, judgements or decree, and judge's signature, although the majority of limited jurisdiction courts in the state of Minnesota do more recording than that listed above. If there would be a question regarding facts or testimony he judge would probably grant a trial *de novo* and rehear the entire case. Most county courts outside the metropolitan area have limited recording systems that are equal in inefficiency to those tribal courts that do not have an elaborate recording system or more prosperous courts."

Montana.—"Under the Montana Revised Codes, there is no particular section which states specifically what constitutes a court of record. The particular section only says that the state shall create and maintain a court system and that district and supreme courts shall be courts of record. What constitutes such a court is not stated. The statute goes on to say that the supreme court can create rules of court. But, to my knowledge, there are no rules of court which say that a court of record must maintain name, case, pleadings, finding of facts, opinions, disposition, and signature/seal of the court. There is no state statute which requires state courts to recognize only judgments and decrees from courts of record that would qualify under state standards. No such analysis or investigation is made."

"The state is not interested in such problems as courts of record, extradition, due process, etc., until after it determines whether or not it should grant recognition to judgments in certain subject matter areas. If the state decides to grant limited recognition, it will then consider due process problems. In other words, the fact that tribal courts may not be courts of record, is not a problem as far as recognition of tribal judgments is concerned. The problem is subject matter."

South Dakota.—"If a court is created by statute it qualified as a court of record in South Dakota. There is no state statute that requires state courts to recognize only judgments and decrees from courts of record that qualify as such under state standards or rules."

D. SUMMARY OF RESEARCH FINDINGS: RECIPROCITY ISSUE

1. Definition

Reciprocity signifies a mutual interchange between two or more sovereign governments of favors, privileges, or protections granted to the citizens of one government on the condition that similar advantages be returned on an equal and mutual basis. In most of the states where research was conducted, there was little or no interchange between tribal and state courts. A few arrangements for extradition have been developed but are often one-way in favor of state systems with limited application in favor of tribes. This practice has been the primary reason for tribal government objection to "reciprocal" arrangements.

2. Summary by State

Arizona.—Arizona state court systems have probably been more receptive of tribal court recognition than any other state system included in the research project. At least on one occasion, an Arizona court recognized a tribal court judgment on the theory that a judgment valid by the law where rendered is presumed valid anywhere.[7] Arizona court systems surrounding the Gila River

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[7] See *Begay* v. *Miller*, 70 Ariz. 380, 222 P.2d 624 (1950).

Reservation have cooperated with the tribal court in developing an informal working relationship. This mutual arrangement between state and county courts and the tribal court has functioned in a role almost equivalent to formal reciprocity.

Minnesota.—Reciprocal arrangements between the tribe and the state are not needed in light of Public Law 280 which gives the state criminal and civil jurisdiction over the reservations. The recent retrocession act of the Nett Lake Reservation has provided an incentive to the Leech Lake court to assert more of its limited jurisdiction which may necessitate reciprocal arrangements. There is some indication that the Minnesota legislature might consider retrocession from Public Law 280 for the other reservations presently under state jurisdiction.

Montana.—The potential for reciprocal arrangements had appeared good in spite of the general policy to date of trying to undermine tribal authority in questionable situations. The Governor of Montana recently established an Indian Policy Commission which was to review and analyze jurisdictional conflicts between state and tribal governments; however, on February 1, 1976, the Montana Jurisdiction Commission voted to dissolve due primarily to a lack of tribal support. Consequently, Montana state policy, as shown by practice over the past 20 years, remains antagonistic toward mutuality with tribes in the state.

New Mexico.—The state policy in the past has generally been one of nonrecognition of tribal court powers and authority. However, the tribal courts examined (the Isleta Pueblo tribal court and the Mescalero tribal court) indicated that they had been able to develop a fairly stable relationship with the surrounding counties despite such state policy. The Isleta Pueblo tribal court expressed a willingness to establish good reciprocal relationships but also expressed skepticism regarding the state's or county's willingness to establish the agreement on a two-way basis. Presently, there is cross-deputization with the two surrounding counties but the Isleta tribal police officers seldom exercise their deputy authority. This is a result of the confusion regarding the extent of their authority and to what extent county deputies will use their authority within the boundaries of the reservation. Mescalero tribal judges appeared content with the present situation and seldom found a need for more formal reciprocal arrangements. The underlying reason for this hesitancy is based on the fear that if the tribal court sought reciprocal agreements, the surrounding counties might be tempted to exceed their authority.

North Dakota.—There are no reciprocal arrangements between the tribal court at Ft. Berthold and the neighboring courts. The counties surrounding the reservation do afford some recognition to child custody and divorce judgements, suggesting some willingness for some type of mutual arrangement. There is also some cross-deputization with the counties. Since there has been little demand from the tribal court for recognition of their judgements, it is difficult to determine whether the state or counties will be willing to enter into formal reciprocal agreements.

South Dakota.—A negative declaration has been voiced by the Attorney General, stating that there is no state requirement of recognition leaving reciprocal arrangements to county discretion. Despite this opinion, there has been some indication that if "true reciprocity," i.e., full mutual cooperation could be arranged, the state would consent.

Washington.—A reciprocal agreement with the local counties would be acceptable to the Quinalt tribal court. The present practice by surrounding counties of remanding Indian juveniles to the tribal court suggests that the county courts are paying some deference to tribal authority. Washington is the only state with a statute that allows state and county courts to give full force and effect to civil tribal judgments if such judgments are not inconsistent with state policy.

3. Excerpts from student reports

Most state and tribal officials interviewed expressed the view that a reciprocity agreement is desirable if it is one which is designed to protect the interests of both the state and the tribe involved. The following excerpts were taken from the student reports to illustrate this view and to demonstrate the varying approaches taken by particular court systems.

Arizona.—(Gila River): "Since tribal court decisions are not given comity or some type of full faith and credit in state courts, the Gila River Community

(GRC) has made an informal 'working agreement' with surrounding counties."

"The agreement calls for both extradition and tribal court decisions to be given validity by state courts. The procedure involved is this: If a state policeman comes to the tribal court with a warrant for the arrest of a resident member of the tribe, the judge shall issue a tribal warrant and allow that state officer to arrest the person on the reservation. The converse is true of tribal police giving state authorities a warrant for an Indian off the reservation and thereby arresting the Indian off the reservation."

"As was stated, the GRC does not have to recognize the decisions of other state civil decisions, but it probably would absent due process violations. The state courts of Maricopa and Pinal County would likewise give comity to the judgments of the GRC Court absent any due process violations. This is brought about by the working agreement between the surrounding counties and tribal court."

"However, in the criminal area it would appear that the GRC Court may not allow extradition or issuance of a warrant absent the working agreement between the county and the tribe. If a member of the tribe had committed a crime in Flagstaff County, the tribal judge might look into the merits of the charge and decide whether to allow extradition. Generally a good statement of present policy on the GRC is that civil and criminal judgments by a state court will be granted full faith and credit in the GRC Court. The judgments of the GRC Court shall also be granted some type of full faith and credit by reason of the working agreement between the tribe and county. This allows for the orderly exercise of county and tribal laws which are required if each sovereign is to fulfill its obligations towards its residents. On the other hand, absent a working agreement civil judgments by a distant county may be given full faith and credit unilaterally, in a tribal court."

Minnesota.—(Leech Lake): "At the present time there is no reciprocity between the Leech Lake Reservation Conservation Court and courts in the state of Minnesota. Minnesota has P.L. 280 jurisdiction on Leech Lake Reservation and does not need a reciprocal agreement for criminal extradition off the reservation. The same holds true for writs of execution for money judgments for tort or contract actions."

"Social service institutions as such are not affected by the jurisdiction of the tribal court. Most social services are either through the reservation or contracted by the reservation under P.L. 638, the Indian Self-Determination Act of 1975. The state of Minnesota and the county of Cass also provide social services."

"There has been some unilateral agreement with the Department of Natural Resources (D.N.R.). The Leech Lake Conservation Commission has a cross-deputization plan with the D.N.R. The Chief Judge stated: 'The tribal wardens can arrest Indians as well as non-Indian violators within the Reservation boundaries. The same holds true for D.N.R. wardens. The agreement for tribal wardens to take non-Indians to county authorities and D.N.R. wardens must take Indians to the tribal officials if the violation occurred within the reservation boundaries. If not within the boundaries the Indian person will be taken before state officials.' The tribal judge expressed his view that this arrangement is working out well for both concerns. The state needs no tribal permission to enter the reservation to extradite Indians or non-Indians for whatever reason. Most officials treat the question of reciprocity with the tribal court as untimely unless the tribal court would seek to have its judgments recognized off the reservation. Until then, the state officials will, or probably more to the point, do not even think about this issue and have no answer ready when questioned. Reciprocity is not legally impossible but just unthought of. The tribe must take the initiative to get reciprocity before the state will ponder the issue."

Montana.—(Rocky Boys): "Reciprocity has not been practiced. The tribe has granted extradition to the county but there is no basis for it. No precedent exists."

"The potential is good for reciprocity. The governor appears to be sympathetic and the members of the Montana Indian Policy Commission seem optimistic that reciprocal arrangements can be worked out. Montana officials do not view reciprocity as legally impossible but in the past it has been impossible because of policy. It has not been accorded but if it were, both sides would like to screen the requests."

NOTE.—This interim report was written in July, 1975. The Indian Policy Review Commission was established in July of 1975 and subsequently disbanded in February, 1976.

"An imbalance would result in favor of the state and the tribal court would like to see some type of ratio worked out that would make up for the imbalance, i.e., there would be many more Havre merchants asking to have claims from district court satisfied than Indians seeking to have tribal court claims satisfied in Havre."

Montana.—(Ft. Belknap): "The state of Montana has just recently established an Indian Policy Review Commission. The purpose of the Commission is to review jurisdictional conflicts between state and tribal law. The state has appropriated $150,000 for the Commission and as soon as the eight members are appointed, a staff will be hired with an Indian attorney as its chief of staff. This will probably be Mr. Urban Bear Don't Walk. Four of the members will be Indians. Only one has been selected so far and that is Mr. Day of the Crow Reservation, who is also the head of the Montana Inter-Tribal Policy Board. One non-Indian has been selected and that is Mr. Steve Brown, the Governor's Chief Counsel."

"The Commission will consider jurisdictional conflicts in such areas as: taxation, education, human resources/welfare, alcoholic treatment, water and land use, as well as environmental law. After consideration of such conflicts, recommendations will be made by the state to the Congress re: what changes should be made. The Commission may recommend limited reciprocity in certain subject matter areas."

"The structure of the Commission will involve the creation of local task forces on the reservation-county level. There will be three members per task force. One will be an Indian chosen by the tribal council. One will be a county commissioner selected by the county commissioners of the subject county. The third will be chosen by the other two. The importance of the Commission, as related to 'reciprocity' and recognition of tribal judgments, is that after the Commission has reviewed each subject matter area, it will then determine whether or not the state should grant full faith and credit uniformly, or on a limited basis. For example, it is likely that such recognition may be accorded to marriages, divorces, births, deaths, child support, etc., but not to areas involving taxes or land use. The recording problem is not the bar to reciprocity. See Appendix."

"*Extradition.*—The state has a Uniform Extradition Act but it only applies to other states of the Union. Unless Indian tribes can be considered to be included under "territory" there is no duty to honor tribal extradition requests. Throughout the rest of the Act, there is only reference to 'States.' The procedure requires the out-of-state extradition warrant to be served upon the state which will then serve it upon the prospective defendant. The Governor (Attorney General) does not make any due process analysis. The 'defendant' may, however, petition the state court for a writ of habeas corpus, and upon hearing, could conceivably bring due process violations. There are no statutory requirements as to due process inquiry however."

"The following is the Tribal Code Section 15 *Extradition* and covers a unilateral extradition ordinance. This has been passed by the Secretary of the Interior, but the state does not know that such an ordinance exists."

> 'Section 15 *Extradition*'
>
> '*Section 15.1*—Any Indian found within the boundaries of the Fort Belknap Indian Reservation who is wanted by State or Federal authorities, or by any other Tribe or Reservation for a violation of State, Federal, or other tribal laws committed outside the confines of the Reservation and a warrant of arrest having been issued from a State, Federal, or Tribal Court, may be arrested and taken into custody by Bureau or Tribal enforcement personnel for prompt transfer to the appropriate enforcement agency.
>
> *Section 15.2.*—Copies of other jurisdiction warrants must be presented to the Clerk of the Community Court whereupon they will be recorded as to the date and time received. The warrant will be promptly presented to the judge for a review as to date, charge and person named thereon, to determine its validity. The judge, after satisfying himself as to the validity of the warrant, will issue an order for the arrest of the alleged fugitive from justice.
>
> *Section 15.3*—All persons being taken into custody as provided in the preceding paragraph shall be taken by the police officer to the Court whereupon the judge shall hold a hearing to determine whether the person in custody and before the Court is the same person charged on the face of the

warrant. Such hearing may be waived by executing a waiver of removal hearing and he will be promptly turned over to the custody of the appropriate official.

Section 15.4.—Where a warrant is issued from a state other than the state of Montana, the warrant should be presentd to the Court by the sheriff of the county in which the Reservation is located. Upon assurance by the local sheriff that the out-of-state agency will extradite the wanted subject, the procedure governing the arrest of the wanted fugitive may be completed as in other cases.

Section 15.5.—After a hearing, as provided in paragraph two (2) above, if the judge is satisfied the fugitive is the same person named in the warrant, the judge shall order an appropriate official to remove the fugitive from the Fort Belknap Indian Reservation.

Section 15.6.—In all cases wherein persons are arrested by Community or Bureau of Indian Affairs police the requesting agency supplying the warrant shall be immediately notified that the subject is in custody.'

"There is no discernible difference in procedures between members and non-members."

IV. Summary

THE RESEARCH

During the course of the research, it was found that few reciprocal arrangements of any type exist between the states and tribes or counties and tribes. Few formal or permanent arrangements for criminal extradition have been developed and the informal extradition arrangements that do exist often turn out to be one-way in favor of state or county systems with only limited application in favor of tribes.

The approach of the Gila River Community Court provides an exception. It has negotiated with neighboring county courts and law enforcement agencies and developed a series of agreements concerning mutual recognition in both criminal and civil areas. Through such "quasi-formal" intergovernmental agreements, the tribal and neighboring county jurisdictions have enhanced the effectiveness of their respective governments to protect the rights of their constituents. This approach is only an initial step since the emphasis has been on law enforcement and the mutuality and jurisdiction issues have not been clarified. However, the informal agreements and steps that have been taken are unquestionably progressive when compared to other jurisdictions.

In the civil area, few writs of execution for money judgments for tort or contract actions emanate from tribal courts and there is little evidence or information available regarding state recognition of such writs or any agreement to such recognition. Minimum state/tribal agreements exist regarding commitments to state social service institutions. In this regard, a few states, specifically Montana and North Dakota have noted a willingness to enter contractual arrangements for commitments when desired but little has actually been done in this area.

A substantial degree of state/tribal reciprocity has occurred in the area of cross-deputization whereby tribal law enforcement officers arrest non-Indians committing offenses on the reservation and turn them over to state officials and state law officials arrest Indians committing offenses on state patrolled right-of-ways and turn them over to tribal officials. Tribes which have cross-deputization agreements with state or county law enforcement agencies appear generally satisfied with such agreements. (See, Appendix A)

A common complaint voiced by tribal officials regarding existing informal reciprocal arrangements is that they often operate unilaterally rather than mutually. Historically, the tribes have generally recognized and granted state judgements and requests for tribal enforcement or response. However, state and county agencies have not been so cooperative in recognizing and responding in kind to tribal requests.

There appears to be very little if any legal authority specifically addressing the question of reciprocal recognition. Of the states covered by the research project, only two states have officially taken a view regarding reciprocity. In South Dakota, the Attorney General, in April of 1975, stated that there is no state requirement of full faith and credit, thus deferring reciprocal arrangements to county discretion. In New Mexico, a 1975 declaration by the State Supreme Court that full faith and credit be granted the Navajo Nation laws appears more affirmative. This recognition of the Navajo Nation as a territory whereby the New Mexico court's view justifies full faith and credit clause application, is probably the closest thing to legal authority for reciprocity since no statutes exist in any of the states that specifically authorise state reciprocity. State courts in Arizona and Oregon have recognized tribal judgements on the basis of comity without specifying the exact basis. In light of these facts, it still appears as the most appropriate and desired arrangement for the states and counties surveyed by this project.

The major reason for hesitancy by state and county court systems regarding mutuality in recognition of judgments seems to be a lack of confidence by state officials in the ability of tribal judges to assure application of legal principles in a fair and competent manner. Even as to the tribes which have gained working relationship with surrounding counties, a recurring attitude of distrust exists toward tribal court systems and tribal governments in general. None of the states studied, with the possible exception of New Mexico, appears ready to allow full recognition of tribal judgments based on full faith and credit principles. Additionally, most state judicial officials appear reluctant to recognize tribal courts as "courts of record" based on the notion that the records kept by most tribal courts are inadequate under due process standards or state policy. Frequently, tribal due process standards are indefinite and wide differences in definition of due process exist. There are no clear guidelines for tribal courts to use to comply with due process principles which could lead to a blanket recognition of tribal court judgments in any particular state.

One important fact state and county court officials seem to overlook or ignore is that Indian tribes are forced by limited resources or a basis founded on tradition or custom in some cases to continue a system of minimal record keeping. Additionally, many judges are required to exercise their authority under intense political pressures. As well, most judges have an abiding concern with maintaining the degree of cultural and traditional practices that remain within the tribe, and these practices might not always be consistent with state policy or concepts of due process.

This research effort uncovered no state statutes prohibiting judicial recognition of tribal court actions. Since all tribal courts examined afford appellate procedures for parties dissatisfied with a trial court judgment, the requirement of finality of judgments would be met. Generally, it is justifiable to conclude that in the states studied the courts clearly have independent discretionary authority to recognize tribal court judgments and orders based upon an attestation of final disposition. Additionally, the problem of a lack of jurisdiction on the part of the state would not arise simply because the state or county court would be acting merely to enforce the lawful order of a court possessing original jurisdiction—the tribal court. Referring, of course, to instances where the legal dispute involves tribal members and took place on the reservation, the basic elements of tribal jurisdiction appear. In cases arising off the reservation falling within the original jurisdiction of the state, the same legal theory applies regarding tribal enforcement of state court orders.

Based upon analysis of prevailing attitudes, it seems clear that until convinced of the advantages of fully recognizing tribal court action as a necessary element in achieving mutuality, the states and conties will continue to grant recognition on a limited basis. The burden of proof is apparently on the tribal courts to demonstrate procedural adequacy and minimal competency before the state officials are truly receptive to the concept of mutuality.

Even if tribal judges were to make all possible efforts to upgrade the quality of judicial administration and record keeping practices of their respective court systems, it is inconceivable that major changes, (particularly the institution of the practice of legal opinion writing) will occur within the very near future. However, in light of the fact that tribal courts are an essential and permanent component of tribal government and that the federal government has consistently followed the policy of officially recognizing the right of Indian tribal self-government it seems clear that the state government practice of non-recognition regarding tribal court actions can only serve to prolong the existing jurisdictional confusion and instances of injustice toward individual and tribal rights.

B. THE LEGAL ALTERNATIVES

Significant differences within states and between tribes in the types of court systems maintained, available resources, local practices, and population point to the need for a substantial degree of flexibility and sensitivity in fashioning relationships between those court systems. Furthermore, different considerations are involved in the criminal area as opposed to the civil. Likewise, within the civil law area, mutuality could mean one thing in domestic relations questions and something else in contract or tort law.

Alternative approaches to tribal/state court reciprocity would include the following:

1. Full faith and credit.—Where the full faith and credit clause is interpreted to be legally binding as a matter of federal law the questions of whether or not to enter into such agreements becomes moot and the remaining issues to be settled concern the practicalities of applying the full faith and credit principle. As noted, only New Mexico has concluded the full faith and credit applies and the court's decision in that case (*Jim* v. *CIT*) did not address the question of how the law should be applied.

2. Judicially defined comity.—In several instances, state courts have gone on record as recognizing the legitimacy and acceptability of tribal court orders on a theory of "comity." The term simply means that foreign judgments can be enforced as a matter of discretion on the part of the court. The point to be remembered about "comity" is that the court acts on each case on an individual basis. Because one judgment is granted comity does not necessarily mean that all cases from the same source will be similarly treated. While it is true that once comity is awarded in one probate case it will more than likely be granted in all similar probate cases, there is no guarantee. Comity is a matter of judicial discretion. Thus, the concept of comity allows for much flexibility in its application by the court.

3. Recognition, as required or allowed by statute.—As previously noted, Washington State has, by statute, provided for recognition of tribal court orders, but left the decisions up to each county government or court. Conceivably, the state could have gone even further and required rather than simply allowed such recognitions. For their part, tribal governments could pass similar laws enabling their courts to grant recognition to state court orders. One would assume that this would only be done where the state or county reciprocates. This method of statutory authorization has the advantage of clarifying the law so that judges know for certain that they do have the authority to grant recognition outside the scope of the full faith and credit principle and on a less ambiguous basis than comity. Since, as in the example of Washington State, the discretion still rests with local courts, there is no absolute certainty by parties as to whether their judgments will be enforced, but as the local practice develops, this uncertainty can be clarified and resolved.

4. Mutuality through "inter-governmental agreements."—The final method for achieving mutuality discussed in the report is in the nature of agreements negotiated between tribal and state and/or county officials as developed by the Gila River Community Court. Unless either tribe or state has officially gone on record opposing this method (i.e., by enacting a law specifically prohibiting or restricting official participation in such agreements), it can be assumed that, as the law now stands, there is no legal barrier to this method. Both tribe and state have the independent authority to initiate such agreements and bind themselves to enforce them. An obvious advantage to this method is that it clarifies the situation so that each court and law enforcement agency is aware of the scope and degree of mutuality existant between their respective governments. Additionally, since the agreements are usually in response to a need for clarification, they can be tailored to the areas where the need for mutuality has been defined, as opposed to initiating total reciprocity when there would be no need. Reportedly, the Gila River people have been satisfied with the way their situation has been working out and the application of reciprocity has proved to be successful.

V. Recommendations

Before Indian courts will ever be afforded complete recognition in the state systems it may be necessary to document the competency of tribal courts to efficiently, competently, and fairly administer justice. Additionally, it appears essential to educate state law enforcement, legislative, and judicial officials, as well as individual property owners surrounding Indian country, on the advantages or implementing reciprocal arrangements consistent with the powers of tribal self-government. Tribal court systems, described by a number of tribal court judges as the "backbone" of the tribal government system, must receive financial and technical assistance where needed in their efforts to effectively administer justice within reservation boundaries. In light of these exigencies the following recommendations are posited.

A. TRIBAL GOVERNMENTS SHOULD

(1) Examine the feasibility of reciprocal arrangements for the purposes appropriate to improving their own tribal/state and/or tribal/county relationships.

(2) Consider the development of a standardized court record keeping system. Such a system should meet minimum state "court of record" requirements as mutually defined by tribal and state representatives.

(3) Improve tribal court management and administration by recruiting and training court support personnel: court clerks, prosecutors, advocates and legal advisors. This may be accomplished with assistance from the BIA and by developing plans for court improvement through existing and proposed governmental and private technical and financial assistance.

(4) Require tribal judges and court personnel to take maximum advantage of training programs conducted by the National American Indian Court Judges Association and other organizations capable of providing appropriate training.

(5) Improve the stability and status of tribal courts by making them a respectable branch of the tribal government, free from potential political influence, with budget control, and with able jurists who have final authority to interpret tribal law, customs, and traditions.

B. THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION SHOULD

(1) Provide maximum financial allocations for tribal court improvement programs, including training and law library materials in order to afford tribes the means for developing and maintaining the competency and efficiency of their court systems.

(2) Improve the quality of tribal law enforcement agencies by continuing and expanding existing training programs.

(3) Re-evaluate LEAA's approach to the administration of justice on reservations. Presently, LEAA appears overly concerned with the training of law enforcement personnel on reservations and providing modern equipment to these agencies. Problems concerning the stabilization of tribal courts appear to be a secondary LEAA priority when in fact the reverse should be the approach.

(4) Implement projects aimed at developing more tribal/state reciprocal arrangements, i.e., cross-deputization, extradition, and/or cross-training.

(5) Create an internal mechanism whereby tribal complaints of indifference and harassment by LEAA regional administrators could be made directly to the National "Indian Desk" of LEAA; and provide the "Desk" with the power and duty to take the appropriate disciplinary action.

C. THE BUREAU OF INDIAN AFFAIRS SHOULD

(1) Equip the new Branch of Tribal Judicial Services with enough flexibility so that it does not have to be in competition with the Law and Order Branch. If competition for funding has been unconsciously built into the relationship between the two branches, then the obstructive element should be eliminated.

(2) Allocate to the Branch of Tribal Judicial Services funding sufficient to implement meaningful reform projects for tribal courts.

(3) Undertake projects designed to promote reciprocal arrangements between tribal courts, state courts, and/or county courts systems.

(4) Provide technical and financial assistance to tribes for the design and implementation of standardized "record keeping." Such technical assistance should include court administration and management instruction.

(5) The Bureau should make public a policy which advocates "full faith and credit" consideration for tribal court orders and judgments by state agencies. Alternatively, the Bureau should encourage state and county recognition of tribal court judgments based upon the theory of "comity."

(6) Increase efforts to educate federal, state, and local agencies about the federal trust responsibility owed to Indians, the jurisdictional basis of Indian tribes, and the advantages of cooperative law enforcement policies between federal, state, local agencies, and Indian tribes.

D. THE NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION SHOULD

(1) Use its political clout to obtain funding that would expand its training capacity to include civil law.

(2) Undertake projects designed to promote reciprocal arrangements between tribal courts, state courts, and/or county court systems.

(3) Increase its distribution of written training materials to tribal court judges.

(4) Provide technical assistance to tribes for the design and implementation of standardized "record keeping." Such technical assistance should include court administration and management instruction.

(5) Include in its training efforts the participation of Indian lawyers. The delivery of training by Indian lawyers would be more effective because the tribal court judges could identify with the instructor and would not have to deal with the elitism inherent in the style of non-Indian lawyers.

VI. Legal Background Papers

A. COURTS OF RECORD

Federal definition of what qualifies a federal court as a court of record is difficult to determine. The Judiciary Code (title 28) designates the Supreme Court, Court of Appeals, District Courts, Court of Claims, Court of Custom/Patent Appeals, Tax Court and the Court of Military Appeals as courts of record. However, there is no definition in the Judiciary Code as to what constitutes a court as one of record.

The earliest case offering a definition was *Ex Parte Cregg.*[8] This case was concerned with whether a police court was a court of record within the description of the district or circuit courts and whether it was competent in point of law to receive a declaration by an alien applying for naturalization. The Court noted that a court of record was required to have common law jurisdiction as well as a clerk, duly authorized to record, and a seal. Also, in *DeLovio* v. *Boit,*[9] the Court was faced with whether an admiralty court was a court of record. The Court defined a court of record as one that had authority to fine and imprison; that proceeds according to the course of civil law; and that an appeal and not a writ of error lies from its decrees.

More recently, in *United States* v. *Hanson*[10] the Court held that qualification of a court as one of record must be determined by reference to state law and not by attempted federal interpretation of the Federal Rules. In *United States* v. *Taylor*[11] (an earlier case than *Hanson*) the Court noted that a court of record was one if it had a written history of its proceedings. In another case, a court observed that courts of record of a state are not limited to courts which derive their jurisdiction from state laws only, but include federal courts which are regarded as domestic courts.[12]

In light of the above, it seems reasonable to posit that there is no specific qualification for a federal court to be a court of record and that state qualifications may be used for reference. Note, however, *State* v. *Pierce*[13] which stated that federal courts, although courts of record within a state, are not courts of record of the state.

Since there seems to be no concrete qualification for a federal court to be a court of record, except the statutory designation, it is hard to argue that the "qualifications" deducted from the case law would somehow be applicable to tribal courts. The only possible way the "federal standards" would be applicable is when such standards are codified in a statute applicable to Indian tribes.

State statutory definition.—States designate by statute which courts are courts of record. For example, Arizona has designated its Supreme Court and Superior Courts as courts of record.[14] The State of Washington has also designated its Supreme Court and Superior Courts as courts of record.[15]

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[8] 6 Fed. Cases 796.

[9] 7 Fed. Cases 796.

[10] 460 F. 2d 1375.

[11] 147 U.S. 795.

[12] 11 F. Supp. 668.

[13] 200 N.W. 693.

[14] ARS Const. Art 6, § 30.

[15] RCWA Art. 4 § 11 ; RCWA 2.08.030 ; 2.04.020.

The elements common to state definitions of a court of record are that a court of record is one whose acts and judicial proceedings are recorded for perpetual memory (testimony) and one which has the power to fine or imprison for contempt.

The effect of this definition as a standard is that judgments from a court of record are entitled to full faith and credit, absent violations of due process. On the other hand, judgments from non-record courts are subjects to collateral attack for lack of finality in judgment or lack of due process.

Considering the definition on a literal basis, tribal courts could certainly qualify as courts of record. The major obstacle would be the requirement that the proceedings be recorded for perpetual memory and testimony (i.e., a written verbatim transcript of all proceedings). Several tribal courts maintain records for specific periods of time (i.e., ten days). If an appeal is not taken within the specified time period, the records of the proceedings are either erased, if taped, or destroyed.

State case law elements of a court of record.—There is general agreement that a court of record has several recognized attributes. One such feature is the strong presumption of the veracity of the records from a court of record (i.e., that the record imports absolute verity, because the acts of a court of record are known by its record alone). For example, an Arizona court said, "Records of the courts of record are of such high and supereminent authority that their truth is not to be called into question."[16] Also, a Washington court found that ". . . The only difference between a court of record and a court not of record is that the records of one speak verity until reversed while the other is subject to inquiry in collateral proceedings and the court of record has inherent powers to correct its own records."[17]

As noted by the Washington court in the *McFerran* case, complimentary to the feature of veracity is the fact that a record from a court of record is not subject to attack except for fraud or defect. Therefore, as a court of record, it has inherent powers to look at its own records to correct defects.

It has also been suggested that a court of record must have a judge, a clerk and a seal.[18] However, it is not on that basis alone a court of record.

Another feature of a court of record, noted also in federal case law is that it has power to fine and imprison for contempt of its authority. This courts of record feature is based on the notion that any act tending to interfere with the fair administration of justice cannot be tolerated. Thus, in order to vindicate the dignity of justice and the power of the court, and to enforce obedience to the court's mandates, the power to punish for contempt must be allowed in any civilized community.

After reviewing these elements of a court of record, it seems clear that many tribal courts could be classified as courts of record. The major drawback is the apprehension concerning the quality of justice in a court which has not been designated by statute as a "court of record," and which lacks many of the required formalities observed by official "courts of record."

The acts of a court of record are known by its record alone. In *Herren* v. *People*[19] the Court noted that "* * * the judicial records are not only necessary but indispensable to the administration of justice. Courts of record hear arguments and decide upon its records; it acts by its records, its openings, sessions, and adjournments can be proved only by its records; its judgments can be evidenced only by its record. This is the reason for the creation of courts of record."[20]

The importance of the record can further be illustrated by a discussion of the trial de novo process. In a non-record court (e.g., justice of the peace court), the actual proceedings of the trial are not recorded for review or reference. On appeal, these former trials are re-tried in all manners as though the reviewing court were the original court hearing the matter for the first time. This is called a trial de novo (hearing); and, under this scheme a defendant is entitled to a new trial to redetermine his guilt or innocence.

There are several major criticisms of a non-record court which are also used as justification for re-hearing on appeal. One is the lack of procedureal formalities in conducting the trial. For example, the average time utilized to hear and convict a defendant is minimal and susceptible to error. Critics suspect that where judges are not on salary but on commission the speedy disposition of cases is based on the hope of trying as many cases as possible in order to "earn" a big commission. The most noted criticism is the lack of formal legal training of the judges.

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[16] *State* v. *Anders, Ariz.* App. 181, 400 P. 2d 852

[17] *State ex rel, McFerran* v. *Justice Court*, 32 WN2d 544, 202. P. 2d 927.

[18] *State* v. *Weber*, 96 Minn. 422, 105 N.W. 491.

[19] 363 P. 2d 1044.

[20] Ibid. at 1046.

Another criticism is that judges from non-record courts abuse their powers. For example, sentencing abuses are frequent. A judge will use his sentencing power to discourage appeals. This is accomplished when a judge gives a defendant a lighter sentence, when in fact a stronger sentence would be imposed if an appeal was made.

As well, critics point to the fact that since no record is made for reference, (i.e., only the word of the non-attorney judge), the quality of justice is questionable and subject to serious flaws. Moreover, the evidentiary importance of the record is logically based on the effect it will have an appeal. The validity of the appeal will typically depend on two things: (1) the timely filing of the notice of appeal, and (2) the deposition of the record which will reveal the finality of the judgment with the appellate court. The finality requirement is significant because only a "final judgment is appealable.

If no appeal is taken and the judgment is entered as a final and bniding judgment, the next consideration is whether another court will recognize and honor it as a valid judgment. The recognition of a "so-called" foreign judgment is mandated by the full faith and credit clause of the Constitution, Article IV, § 1. The "actual" recognition, however, will depend on the evidentiary effect of the record.

The following are "evidentiary" of a valid judgment entitled to recognition:

1. The judgment must be final under the laws of the rendering court.
2. The judgment must be on the merits, i.e., a consent judgment (cognivit) does not satisfy this condition.[21]
3. The judgment must have been fairly procured by complying with minimum requirements of propriety. For example, fraud would bar recognition.[22]
4. Finally, the judgment must have been procured by procedure complying with the requirements of the rendering court. If a judgment is to serve as a basis for maintenance of an action under the full faith and credit clause, it must conform to the above outlined standards.

State definition as element or precondition to reciprocity

Whether the state definition as a standard is an element or precondition to reciprocity between the state and the tribe will depend on how much either of the sovereigns is willing to give. Reciprocity is used to denote the mutual relation existing between two states or sovereigns when each of them gives the other certain privileges on condition that the same type of privileges be extended.

The state, if agreeable to reciprocal arrangements, would possibly argue that the court of record standard be a pre-condition to any type of reciprocal agreements. On the other hand, the tribal court might argue that the state's court of record standard be viewed as an element to be considered along with other distinct attributes of a tribal court (i.e., legal effect and interpretation of traditional customs).

Due process and court of record standards

The fundamental importance of due process has been clearly established by the Supreme Court. "Parties whose rights are to be affected are entitled to be heard, and in order to enjoy that right they must be notified."[23] It is equally fundamental that the right to notice and opportunity to be heard be granted at a meaningful time and in a reasonable manner. Thus, the requirements of due process are notice and an opportunity to be heard.

Notice has been defined as an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality, and must be reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action."[24] The notice must, likewise, be of such nature as to afford a reasonable time for those interested to make their appearance, with due regard given to the nature of the proceeding.[25]

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[21] *D. H. Overmyer v. Frick*, 405 U.S. 174.
[22] *Baker v. Erbert*, 427 P. 2d 461 (1967).
[23] *Baldwin v. Hale*, 68 U.S. 223.
[24] *Mullane v. Hanover*, 339 U.S. 306.
[25] *Mario v. Supreme Court*, 456 P. 2d 634.

The requirement of opportunity to be heard has been deemed as a safeguard whenever a significant interest is at stake.[36] The hearing must also be granted at a practical and reasonable time.[37]

So viewed, the requirements of due process under the Fourteenth Amendment seem to impose a strong barrier against the deprivation of fundamental individual rights. In light of these considerations, the major question to be asked is whether the passage of the Indian Civil Rights Act imposes a different standard for Indians or whether it should be interpreted according to the United States Constitution standard.

To date, the federal courts have consistently recognized an intent in the Civil Rights Act of 1968[38] to create "*sui generis*" standards of due process which would allow for uniquely Indian concepts of justice. For example, in the recent case of *Martinez* v. *Santa Clara Pueblo*, the Court let stand an Indian tradition which constituted discrimination against descendants of female members married to non-tribal members. The rationale adopted by the Court was that the individual civil rights should not take precedence over the tribal right to follow established custom, albeit violative of Anglo concepts of justice. However, the courts have been saying at the same time that when Indian customs or traditions were not involved, the rationale for substantive deviation from standard concepts of due process and equal protection will not be sustained. The upshot of these interpretations of the Indian Civil Rights Act would seem to be reassuring to non-Indians and state courts that tribal courts will be required to follow standardized due process procedures in the administration of justice unless tribal custom or tradition is involved. The provision for deviation would not apply to 90 percent of the cases involving reciprocity.

In any event, whether or not there is a different standard of due process for Indians remains questionable, but it should be remembered that "due process tolerates variances appropriate to the nature of the case."[39]

From the above, it would seem that record keeping methods of tribal courts could arguably qualify or come close to qualifying as courts of record. The crucial point to emphasize to tribal courts is the mandate of "due process" in whatever context or standard qualified. At least by a traditional approach, due process means notice and hearing when substantial rights are affected.

Nonetheless, a necessary inquiry must be made to determine whether the qualifications attributed to "courts of record" are desirable or required features. The significance of this question will be evident when considering the "attributes" of a tribal court. For the most part, tribal courts are influenced by the Anglo system of law. This is true even though they may operate more or less by traditional customs of justice. However, they are autonomous legal systems and are entitled to recognition and respect. Because of the non-record character attributed to tribal courts, they have been subjected to criticisms similar to those advanced against state non-record courts. As a consequence, the same effect of questioning the quality of justice of a non-record court applies to tribal courts.

Most tribal courts do maintain some type of record system. Although the system may be no more than a general log of pleadings filed, parties to the action, names, addresses, and dispositions of cases, it is a method of record keeping. The possible determining factor is whether the particular method of record keeping provides the "evidentiary effect" important in recognition of a judgment.

Assuming that the tribal record does provide the necessary evidentiary effect, and assuming that a court which keeps records can be a court of record, there seems to be no doubt that tribal courts have moved closer to qualifying as courts of record. The major difficulty would be determining just what type or method of record keeping is required. An answer might be suggested by the discussion about the importance of the record regarding appeal or recognition issues.

The feature of truth and veracity will be determined by the analysis of the record as having "evidentiary" effect. It should be noted and relied upon for presumption of truth and veracity that when an appeal is not taken within the time limits, the failure to do so should be presumed to reflect satisfaction with the procedures. This should include satisfaction with due process as afforded within the proceeding.

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[36] *Fuentes* v. *Shevin*, 407 U.S. 67.
[37] *Phoenix Corporation* v. *Roth*, 284 P. 2d 645.
[38] 25 U.S.C. § 1302–03.
[39] 339 U.S. 306.

Although it has been suggested by several courts that a judge, clerk, and seal be featured as attributes of a court of record, it seems fair to say that the qualifications of a tribal judge should be different. The criticisms of a non-record court judge who lacks formal legal training may be well founded considering the context and environment in which they work. A tribal judge's qualifications must be viewed within the context he or she functions (i.e., a separate and distinct community with different values and customs).

Although there is some merit to the criticism that a lack of formal legal training will hamper the judge's ability to rule on legal issues, it should be noted that tribal judges often participate in workshops designed to keep most of them abreast of the legal formalities and terminology. Of course, an argument can be made that when professional counsel appears before a tribal court, the judge may be "snowed" by the legal technicalities or terminology, thus affecting his ability to rule correctly. The result might raise an equal protection issue, subjecting the tribal court to further confusion.

A relatively easy way of resolving problems which might result from the tribal judges' lack of professional legal background would be for tribal courts to make use of lawyers as advisors to the court in such capacities as court advisor, (technical assistant similar to the "special master" used by federal courts when faced with highly technical subject matters). The lawyer would assist the tribal judge in understanding the technical aspects of the law so as to arrive at a decision on the merits.

The tribal court has the power to fine and imprison for contempt of its authority. For similar reasons (i.e., to vindicate the ends of justice), the tribal court provides a means to enforce its orders through contempt.

In conclusion, the best response to the court of record issue is that tribal courts must develop their record keeping to import verity and to provide the necessary evidentiary elements significant to the matters of appeal and recognition. A further corollary to this suggestion is that tribal courts themselves must define the standards they want for their record keeping. However, they must remember that the standard they establish must then demonstrate observance of due process requirements.

B. RECIPROCITY

Closely related to the court of record issue is the issue of reciprocal arrangements and the effect of federal law regarding the recognition of tribal court judgments and decrees. The status of state court decisions and attorney generals' statements regarding these issues is also relevant since it is primarily with these state systems that the tribal court systems must operate.

The most typical problem regarding the recognition issue arises in a situation where a judgment is entered by a tribal court and the subject of the judgment removes himself from the jurisdictional limits of the tribal court or where a judgment is entered against a person in a state or county court and that person removes himself onto reservation land outside of the state or county court jurisdictional reach. In each of these situations, absent reciprocal arrangements between the state and the tribe involved, or absent state and tribal policy of full faith and credit, the judgments involved will not be automatically enforceable outside the jurisdiction of the court which entered the judgment. In part, this unenforceability situation is the result of the state and tribal interpretations of the full faith and credit clause of the United States Constitution and 28 U.S.C. § 1738, the federal statute providing for full faith and credit recognition to United States territories and possessions.

There are very few cases which have specifically covered the issue of recognition of tribal court judgments. Consequently, the issue of whether states and tribes must grant full faith and credit to judicial proceedings to each other is still a relatively open question.

Full faith and credit

The United States Constitution, Article IV, § 1 states that: "Full Faith and Credit shall be given in each state to the public Act, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U.S.C., § 1738, the Federal statute implementing the Constitutional provision states:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such state, territory, or possession thereto.

"The records and judicial proceedings of any court of such State, Territority, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Indian tribes are not states within the meaning of Article IV, § 1 of the Constitution. However, it has not yet been clearly determined whether Indian reservations are territories within the meaning of 28 U.S. § 1738 so as to require application of full faith and credit through that provision to tribal court judgments and decrees by state court systems. Until this definition has been determined, most states wherein tribes desiring judicial recognition are located will undoubtedly continue to withhold full faith and credit to tribal courts.

There is a line of federal court cases holding that Indian tribes are territories which qualify for full faith and credit recognition. The cases most noted for this federal recognition include *Mackey* v. *Coxe,*[30] *Standley* v. *Roberts,*[31] and *Raymond* v. *Raymond.*[32]

In *Mackey,* the United States Supreme Court held that an administrator appointed by a probate court of the Cherokee Nation occupied the same position as an administrator appointed by any state or territory of the United States. The Court went on to say of Indian tribes:

"* * * In some respects they bear the same relation to the federal government in its second grade of government under the ordinance of 1787.

"* * * The principal difference consists in the fact that the Cherokees enact their own laws. This, however, is no reason why the laws and proceedings of the Cherokee Territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign but a domestic territory. (Emphasis added.)

"* * * The Cherokee Country, we think may be considered a territory of the United States, within the Act of 1812 (June 24th). In no respect can it be considered a foreign State or Territory, as it is within our jurisdiction and subject to our laws." (Pp. 103–104)

In *Standley* it was held that a federal court may not, by injunction, restrain the enforcement of a judgment rendered by the Choctaw Circuit Court and affirmed by the Choctaw Supreme Court, affecting title to land and rights to rentals within the Choctaw Nation. The Federal Circuit Court, Eighth Circuit, went on to say: ". . . . The judgments of the courts of these nations, in cases within their jurisdiction, stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit." (i.d., at 845)

And in *Raymond,* a tribal court divorce decree was upheld by the Eighth Circuit. The Court stated; ". . . The Cherokee Nation . . . may maintain its own judicial tribunals, and their respective judgments and decrees upon the rights of the persons and property of members of the Cherokee Nation as against each other are entitled to all the faith accorded to the judgments and decrees of territorial courts."

It is this line of cases recognizing tribal areas as territories that allowed Felix Cohen in his book, "*Handbook of Federal Indian Law,*"[33] to conclude that an Indian tribe bears a relation to the United States similar to that which a territory bears to such government, and similar to that relationship which a municipality bears to a state. Cohen also emphasized that an Indian tribe may exercise complete jurisdiction over its members and within the reservation subordinate only to the expressed limitations of federal law.

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[30] 18 How. 100 (1855).
[31] 59 Fed. 836.
[32] 83 Fed. 721.
[33] University of New Mexico Press, p. 148.

The leading modern case emphasizing the "territorial" view by the United States is expressed in *Iron Crow* v. *Oglala Sioux Tribe.*[34] This case involved the issue of whether the Oglala Sioux Tribal Court is a duly constituted court having jurisdiction to try, convict, and punish enrolled members of the Oglala Sioux Tribe for the crime of adultery committed on the Pine Ridge Reservation. The Court answered in the affirmative and noted that the United States Constitution and its founding fathers regarded Indian tribes as sovereigns which continued as sovereigns, citing *Worcester* v. *Georgia.*[35] The Court noted that tribal self-government power as sovereign have been limited at times by federal cases and statutes but that political sovereignty continues absent specific federal legislation to the contrary. Then the Court noted that the federal cours have uniformly held that the decisions of Indian Tribal Courts, rendered within their jurisdiction, territorial and personal, and according to the forms of law recognized by the tribe, are entitled to full faith and credit.

However, the states have not been willing to apply full faith and credit to tribal court judgments and decrees to the extent these federal cases would appear to require. The State Attorney General of South Dakota is not bound by the full faith and credit clause of the United States Constitution. Official Opinion No. 75-75, April 25, 1975. The Attorney General believes the federal government's unique Constitutional relationship with the Indian tribes may require the federal government to afford full faith and credit to tribal judicial acts but that these federal cases do not support the proposition that the states must give full faith and credit to tribal court orders. His analysis in part says:

"Section I of Article IV of the United States Constitution requires the states to give full faith and credit to the judicial acts of other states. This doctrine does not extend to the judicial acts of Indian tribes which are not states. Neither does the doctrine of comity which presupposes two independent sovereign nations. *Begay* v. *Miller*, 70 Ariz., 380, 222 P.2d 624, 628 (1950).

"As my predecessor held in 1957-1958 AGR 65, 66, the state has no duty to accept a tribal court record for filing: Tribal Court records are not given effect by any law of the state nor is there any requirement that the action taken by such recognized tribunal must be made a record in any court of the state."

By way of contrast, the New Mexico Supreme Court has recently concluded that the Navajo Reservation in New Mexico must be defined as a territory under 28 U.S. § 1738 and has declared Navajo tribal laws entitled to full faith and credit.[36] The effect that this 1975 New Mexico Supreme Court decision will have on other state courts is difficult to predict. The problem of gaining recognition for court judgments and decrees emanating from Indian court systems which are staffed primarily by people not formally trained in law persists. Tribal court recording systems often do not meet what appears to be state minimum standards. (See appendix A.)

The recognition problem is compounded by the fact that the full faith and credit principle does not appear to be an unqualified requirement.[37] One aspect of the problem is that a state need not subordinate its own statutory policy to a conflicting public act of another state.[38] Thus, any tribal law or court judgment that appears to be in conflict with state policy would be susceptible to nonrecognition by the state system in which full faith and credit is requested. The State of Washington, for example, has enacted a statute that gives full force and effect to tribal court judgments in civil cases if such are not inconsistent with state public policy.[39]

The fact remains that apart from New Mexico, the full faith and credit clause is not accepted as binding by any other states regarding tribal laws and judgments and until we see a definitive federal court decision or Congressional statement requiring such recognition, that clause will not serve to bind the states regarding tribal court judgments and decrees.

Comity

An alternative to full faith and credit clause application is comity. Comity is defined as courtesy, respect, or a willingness to grant a privilege, not as a matter of right, but out of deference and good will. It is the principle by which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another out of deference and respect to the other jurisdiction.[40] Comity is a phrase designating the practice by which the courts of one state follow the decision of another on a like question, though not bound by law or precedent to do so.[41]

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[34] 129 F. Supp. 15 (1955).

[35] 192 F. Supp. 15, 19.

[36] *Allen Jim* v. *CIT Financial Corporation*, No. 10200, N.M. State Bar Bull., April 17, 1975.

[37] *Pink* v. *A.A.A. Highway Express Inc.*, 314 U.S. 201, 210 (1941).

[38] *Hughes* v. *Fetter*, 341 U.S. 609 (1951).

[39] RCWA 37.12.070.

In *Begay* v. *Miller*,[42] the Arizona Supreme Court afforded recognition to an Indian tribal custom marriage and divorce. This decision was not based on a comity theory but it did discuss the circumstance when the court thought comity is applicable. The Court in *Begay*, in recognizing jurisdiction in the tribal court regarding domestic relations said:

"So far as the Federal Government is concerned, the validity of such divorce is conceded and we see no constitutional basis for the courts of Arizona refusing to recognize the validity of such decrees. Such recognition obviously is not made under the 'Full Faith and Credit' clause of Art. 4, § 1 of the Constitution of the United States, for clearly this clause applies only between States of the Union. Neither is it done under the commonly accepted meaning of the term 'comity,' which presupposes two independent sovereign nations, because the Navajo tribe is not now classed as such, but we recognize it because of the general rule, call it by whatever name you will, that a divorce valid by the law where it is granted is recognized as valid anywhere."

Although the *Begay* court refused to recognize Indian tribes as independent sovereigns which should be afforded comity rights or recognition, the sovereignty status of tribes does not appear so clear that such a blanket denial of the comity doctrine is justified. Indian tribes, in a number of cases have been defined as sovereigns of one type or another (i.e., "domestic dependent nations in *Worcester* v. *Georgia*;[43] "political sovereigns" in *Iron Crow* v. *Oglala Sioux Tribe*, supra; "subordinate and dependent nations of a status higher than that of States" in *Native American Church* v. *Navajo Tribal Council*;[44] "territory" in *Allen Jim* v. *CIT*, supra).

In a recent Oregon Court of Appeals decision, it was declared that a decision by the Warm Springs Tribal Court granting a decree of divorce was entitled to recognition in the State court and would act as a bar to maintenance of a suit for dissolution of a marriage subsequently filed in State court. The Court of Appeals stated that the quasi-sovereign nature of tribes suggests that their judgments are entitled to the same deference shown decisions of foreign nations as a matter of comity.[45] The Court opinion noted:

"A rule of general application is that a judgment entered by a court of a foreign nation is entitled to recognition to the same extent and with as broad a scope as it has by law or usage in the courts of the jurisdiction where rendered, if: (1) the foreign court actually had jurisdiction over both the subject matter and the parties; (2) the decree was not obtained fraudulently; (3) the decree was rendered under a system of law reasonably assuring the requisites of an impartial administration of justice—due notice and a hearing; and (4) the judgment did not contravene the public policy of the jurisdiction in which it is relied upon. *Hilton* v. *Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *Goldberg* v. *Goldberg*, 57 Misc 2d 224, 291 NY S2d 482 (NY County Ct. 1968)."

Justice Langtry of the Oregon Appeals Court stated:

"While a foreign decree will not be recognized as a matter of comity where it has been obtained by means of a procedure which denies a party fundamental due process, the recognition to be accorded a foreign judgment is not necessarily affected by the fact that procedures employed by the courts of the jurisdiction in which judgment was rendered differ in some respect from those of the courts in which the judgment is relied upon."

The Oregon court, in recognizing the Warm Springs Tribal Court divorce decree, accepted the United States Supreme Court decision in *Hilton* that:

"When a foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment as by showing that it was affected by fraud or prejudice * * *"[illegible]

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[40] Ob. cit.

[41] *Mast Foos and Co.* v. *Mfg. Co.*, 177 U.S. 485.

[42] 222 P. 2d 624 (1950).

[43] 6 Pet. 515 (1832).

[44] 272 F. 2d 131, 134 (1959).

[45] In re Red Fox, Nos. 74–2334, CA4640 (Ore. Ct. App., filed Nov. 24, 1975).

Comity is thus applicable by one jurisdiction giving effect to another jurisdiction's laws and judicial decisions. Any State can, by choice, afford this recognition out of courtesy for tribal governments just as tribal governments tend to afford recognition to State law and court decisions. The history of Federal Government recognition of tribes as permanent governmental entities as well as the recent New Mexico Supreme Court interpretation of the definition of tribal areas as "territories," would seem to indicate that Federal and State authorities will be under increasing pressure to encourage expanded working relationships with tribes. Pending a solution of the question of whether the full faith and credit principle applies to the tribal/State relationship, comity appears to be a principle appropriate for consideration by both the States and the tribes at this time in order to promote improved political, economic, and social relationships. Under comity, the receiving jurisdiction is free to define the extent and degree upon which it will enforce the judgments of courts of other jurisdictions.

Existing reciprocity arrangements

A number of tribes have established informal and some formal working arrangements, most notably in relation to cross-deputization with counties within the States where this research was conducted. (See Appendix A.) Informal extradition procedures exist for several tribes. These arrangements appear to be an attempt by concerned tribal and county governments to alleviate existing jurisdictional confusion regarding intergovernmental situations that arise between the tribes, States, or counties.

Existing reciprocal arrangements are few in number when compared to the different types of agreements needed by tribes. Reciprocal agreements are particularly needed in the areas of extradition, cross-deputization, and for judicial decisions including agreements for child support order enforcement, marriage, divorce, and adoption as well as for general civil and criminal reciprocity agreements. Agreements in these subject matter areas can serve as a type of full faith and credit or comity by the respective State, county and tribal governments in the absence of full faith and credit by States under the United States Constitution.

The advantages of reciprocity between States and tribes or between counties and tribes regarding judicial decisions would include: (1) A presumption of validity of court decisions of the governmental entities involved; (2) recognition of court decrees which could result in more expedient and efficient handling of cases involving intergovernmental situations; (3) decrease in confusion regarding jurisdictional issues; (4) reduction of situations wherein parties accused seek refuge in another jurisdiction to avoid process serving or prosecution; and (5) elimination of efforts to bring lawsuits in one jurisdiction to offset a contrary decision in another jurisdiction's court. Other important advantages are that formal reciprocal agreements serve as an indication of governmental recognition of the systems involved and that well planned and well organized reciprocity agreements will improve personal relations between tribal and State officials as well as between tribal, State or county governments. If undertaken, reciprocity agreements would allow officials of all governments involved an opportunity to discuss views regarding status and needs of each government as to proposed agreements. Cooperatively they may then draft and execute agreements that would serve to preserve and protect legal interests of each government.

The mere initiation of reciprocal arrangements would indicate mutuality and the benefits and burdens should be bilateral. Each jurisdiction, under the ideal reciprocal law enforcement or court judgment agreement, would be required to exercise and enforce the judgment and laws only to the degree and scope that the [illegible]'s own judgments or laws are accorded recognition. To do less wo[illegible] be a d[illegible]ice to the governments' constituency and, in the context of the tr[illegible] court/sta[illegible]urt traditional relationship, for reciprocity to be other than

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[illegible] 159 U.S. 205–06

fully bilateral would reinforce the notion that tribal courts are somehow inferior in nature and competency.

VII. Conclusion

It is difficult to predict or generalize regarding future state views on tribal court judgment recognition. As evidenced by the research findings, a status of general non-recognition presently exists. However, it does appear, as evidenced by the growing number of tribal/state reciprocal arrangements and the New Mexico Supreme Court's recent decision regarding full faith and credit to tribal law that tribal courts will be gaining a degree of recognition never before attained. This will be done through the use of reciprocal arrangements patterned after the existing state/tribal or county/tribal agreements, by expanded efforts to improve tribal court quality, by increased training of court judges and court staff, and by improving or expanding court record systems.

The New Mexico Supreme Court is the only state court to recognize a full faith and credit requirement, but it is conceivable that such recognition may have a positive effect when the full faith and credit issue comes before another state court or before the United States Supreme Court. (See Appendix B).

Currently, the pendulum appears to be swinging toward recognition of Indian reservations as "territories" subject to full faith and credit entitlement. This trend, as well as the recurring social, economical, and political problems that exist with non-recognition of tribal government and court systems seem to indicate that the time is ripe for expansion of reciprocal arrangements in the areas of domestic relations, law enforcement, and judicial administrations. Reciprocal arrangements based on comity may also be implemented which would serve as a means of preventing outside interference with tribal governing and judicial functions. Such agreements would demonstrate the intent of tribes to govern their own internal affairs through the use of specific arrangements that limit the ability of state and tribal powers in relation to each other's jurisdictional reach while allowing degrees of cooperation beneficial to all governments involved in any arrangement.

Courts of Record

Type of Record Keeping

Leech Lake (Minnesota).—Record of all actions-trial proceedings taped and erased if no appeal taken in 10 days. No opinions written; would write if ambiquity in Code. Conservation court handling hunting and fishing cases only.

Rocky Boys (Montana).—Record of all complaints, arraignments, hearings and dispositions. No record of proceedings. Files of civil actions. No opinions writing.

Gila River (Arizona).—Taped recordings of all court proceedings; record of parties, complaints, court orders and dispositions. No opinions are written.

Ft. Balnao (Montana).—Records of complaints and dispositions. Cases filed by name and date. No opinions, pleadings or findings of fact.

Quinalt (Washington).—Complete files of all complaints, arraignments, hearings and dispositions, Juvenile files destroyed when individual reached 18 years of age. Some civil case opinions; few misdemeanor opinions recorded.

Minnesota (Leech Lake).—Supreme Ct., District Ct., & municipal cts. These courts must have a judge, clerk, and seal to be a court of record. 27A Minn. Stat. Annotated, Rule 44.01

Montana (Rocky Boy's).—Courts of impeachment, supreme ct., and Dist. cts. No minimum recording requirement. RCM 93-101; RCM 93-102

Arizona (Gila River).—Supreme ct., Ct. of Appeals & Superior Cts. Requirements seem to be written opinions and qualified judges but no specific qualifications are noted. 1 ARS Annot., Art. 6, sec. 30.

Montana (Ft. Belnap).—Same as for Rocky Boys above.

Washington (Quinalt).—Supreme, Ct. superior cts. No requirement for recording is noted. But requirements seem to be complete records of proceedings/findings of a court with a seal, RCWA, Const., Art. IV, Sec. 11, RCWA 2.04.020; 2.08.030.

Cheyenne River (South Dakota).—Records of all processes and dispositions of juvenile, misdemeanor, civil and traffic cases (questions of adequacy exists, however). Opinions sometimes written in past.

Ft. Berthold (North Dakota).—Records of each case and all types of actions. Records of complaints, petitions and disposition of each case. Opinions written only by appellate court.

Isleta Pueblo (New Mexico).—Records kept of all BIA complaint forms filed. Files of complaint and disposition. Records of all judicial proceedings kept after being transcribed from clerk's notes. Tape recordings of some types of civil actions e.g. quiet title. Some opinions written of civil actions.

Mescalero Apache (New Mexico).—Records of complaints, hearings and dispositions of cases. No opinions written. Files of all civil and criminal actions.

South Dakota (Cheyenne River).—Supreme Ct., circuit cts., county cts., & city municipal are courts of record. Record qualification are established by rules of court. State attorney general stated that a court create statute is a court of record in So. Dakota. All sovereign documents are recognized in So. Dakota if authenticated as to office character or authority, by official certification under seal, by proper authority. SDCL 196 19-7-1. Records and judicial proceedings courts may be proved by original records produced by clerk or judge of such court. SDCL 19-7-4.

North Dakota (Ft. Berthold).—Supreme Ct., cts., county cts., are courts of record. ND Century Codes; 27-01-01.

New Mexico (Isleta).—Supreme Ct., District probate cts., & Cts. of appeal, appear to courts of record. NMSA 16-1-5. Records judgments, rules, orders, other proceeding and a complete index appear to be the major qualifications. NMSA 16-1-5. New Mexico requires a seal to authenticate documents from court or signed by cour clerk. NMSA 16-3-10.

New Mexico (Mescalero Apache).—Same as *above*.

State statute re: recognition of court of record judgment only	*State policy re: full, faith & credit of tribal court judgments*
Minnesota.—No statute. The Minn. state rules of court do not specifically prevent recognition of court keeping systems which do not qualify as "courts of record". Only proof of official record is required. Minn. Stat. Annot., 44.01.	*Minnesota.*—Hesitancy by state because of jurisdiction and due process questions. Minnesota codes do contain provision for full, faith & credit of records, judgments, and laws of other states and territories. 1 Minn. Stat. Annot. p. 323.
Montana.—No statute. Court of record is not clearly defined by RCM except to exclude justice of peace courts from such definition.	*Montana.*—No established formal policy; unwritten policy has been to undercut authority and jurisdiction of tribal courts. Montana courts generally do not honor tribal judgments. Montana doesn't appear ready to recognize the court judgments involving taxes, land use, jurisdiction, extradition, until after Montana Indian Policy Commission publishes its findings.
Montana.—No statute. There appears to be no requirement of an opinion being included in a court record for such record and judgment to be valid in the state judicial system.	*Montana.*—The newly created Indian Policy Commission may recommend full, faith & credit on limited basis.
Washington.—No statute. Washington constitution provides that Washington legislature has power to provide that any court in such state can be a court of record. RCWA, Const. Art. IV, sec. 11.	*Washington.*—RWCA 37.12.070 gives full force effect to tribal judgments in civil actions not inconsistent with state policy.

Arizona.—No statute.	*Arizona.*—Informal working agreement between River and surrounding counties allows some reciprocity between the Indian and non-Indian governments.
South Dakota.—There is no state statute that requires state courts to recognize only judgments and decrees from courts of record, that qualify as such under state standards that state attorney general has stated that state has no duty to accept a tribal court record or judgment. (Officials Opinion No. 75–75, Apr. 21, 1975)	*South Dakota.*—Policy: That U.S. Constitution requires states to give full, faith & credit to other states' judicial acts but since they aren't states, South Dakota is not required to recognize tribal court orders. (Official Opinion No. 75–75, Attorney General, So. Dakota, April 21, 1975). State attorney general stated in an interview that it would be difficult to get legislation allowing full, faith & credit because of the lack of trust between Whites and Indians. He felt formal recognition of tribal court and governments is needed but that such would have to be through legislature of the state. Note: South Dakota has no uniform enforcement action.
North Dakota.—No statute.	*North Dakota.*—Limited recognition of tribal court judgment. No full, faith and credit recognition. No declaration by state of no recognition.
New Mexico.—No statute.	*New Mexico.*—State Supreme Court in 1975 case *Allen Jim*, v. *CIT* decided that Navajo Nation was a "territory" and entitled to full, faith and credit. No state policy has been declared, however, as to all other tribes in New Mexico. So it is not clear as to what extent tribal judgment recognition will be afforded. New Mexico disclaims jurisdiction over reservation probate matters.

Effect of due process satisfaction on state's policy re: recognition of tribal court judgments?	*Are existing tribal recording methods sufficient for state recognition of tribal judgments?*
Minnesota (Leech Lake).—State has no concern because it feels it is in no position to decide such issues. (P.L. 280).	*Leech Lake* (Minnesota).—Discretionary that Minnesota courts would grant full, faith and credit; probably a trial de novo would be had. Same due process analysis applied to Minnesota courts of limited jurisdiction would probably apply prior to tribal court judgment recognition.
Montana (Rocky Boys).—No concern voiced by the state. It is anticipated that this issue will be addressed by the governor's task force on Indian-state problems.	*Rocky Boys* (Montana).—Not sufficient; recording is too minimal at present for state to grant general recognition of Rocky Boys court as a court of record.
Arizona (Gila River).—Some opinion that if due process satisfied, judgments by tribal court can then be recognized and enforced by state courts.	*Gila River* (Arizona).—No, under ARS courts records are designated. So Arizona at present would not grant recognition except on tribe by tribe or case by case selection.
Montana (Ft. Belnap).—No effect or relationship. No concern voiced by the state.	*Ft. Belnap* (Montana).—No; existing methods no bar to recognition but Montana does not appear ready to concede to general recognition of tribal court judgments at press.
Washington (Quinault).—State allows limited recognition of tribal court judgments if not inconsistent with state policy. This would seem to indicate a due process analysis would be applied prior to criminal case judgment recognition in Washington state courts.	*Quinault* (Washington).—Counties afford as recognition in certain subject matter based on tribal records but it is questionable whether Washington would grant a blanket recognition of tribal court judgment based on existing records.
South Dakota (Cheyenne River).—State officials don't appear concerned about recognition of tribal court judgments.	*Cheyenne River* (South Dakota).—Existing tribal recording methods not adequate at present for South Dakota to recognize tribal court judgments except on a case basis subject to strict scrutiny.
Cheyenne River (South Dakota).—Due process requirements of ICRA appear met by tribal court procedures. Notice of hearing, representation and appeal afforded by court procedures.	*South Dakota* (Cheyenne River).—State would view due process standards and compliance case by case prior to recognition of tribal court judgments.
Isleta Pueblo (New Mexico).—Tribal court treats all persons before it with equality. Court allows representation by anyone including professional counsel. Summons, complaint, notice of hearing, appeal are all afforded.	*New Mexico* (Isleta).
Mescalero Apache (New Mexico).—Hearing following notice by summons, limited representation in court by any community member.	*New Mexico* (Mescalero).
Ft. Berthold (North Dakota).—Court procedures allows for notice of hearing or trial, representation in court allowed,	*North Dakota* (Ft. Berthold).—State would view due process standards and compliance case by case prior to afford-

and appeal. Existing records include all proceedings and disposition being recorded except opinions. Under the ICRA it appears due process is satisfied.	ing recognition to most tribal court judgments.

Due Process

Does tribal court procedure meet due process requirements of Indian Civil Rights Act?	*Would state require that due process standards be met before recognition, or would state assume validity of tribal council judgments?*
Leech Lake (Minnesota).—Seems to meet the minimal due process requirements. Rules court must follow are intended to be construed to secure simplicity in procedure fairness in administration and elimination of unjustifiable delay.	*Minnesota* (Leach Lake).—State feels it is no position to decide due process issues because Leach Lake has only a conservation court at present and Minnesota has general P.L. 280 jurisdiction on the reservation.
Rocky Boys (Montana).—Meets the ICRA due process requirements. Court records include case name, parties, type of action, judgment, judges' signature, and complaint signed by complaining witness, with arresting officer's report. Parties are allowed notice, hearing appeal and right to counsel.	*Montana* (Rocky Boys).—Unclear at present. This issue may be clarified within the new year by the governor's Indian Policy Review Task Force.
Gila River (Arizona).—Meets ICRA due process requirements. Court procedures allow notice to parties of action, hearing and time limits, and of parties' rights to representation. An advocate may be requested or appointed and professional counsel is allowed at party's expense.	*Arizona* (Gila River).—State court would look at the due process standards before consideration including proper subject matter and personal jurisdiction, but a few Arizona courts have taken judicial notice of tribal court judgments, presuming validity.
Ft. Belnap (Montana).—Meets ICRA due process requirements. Under 25 USC, sec. 1302 (8) there are no stated requirements as to tribal court proceedings but tribal procedures provide for notice of hearing, right to representation, and right of appeal.	*Montana* (Ft. Belnap).—Same as for Rocky Boys above.
Quinault (Washington). — Tribal court procedures affords hearing, notice of hearing, representation in tribal court, and appeal.	*Washington* (Quinault).—State Court would set the due process standards.

Comments

Minnesota.—Hesitancy will probably continue until the tribe can convince state officials that tribal councils can efficiently and fairly administer justice within reservation boundaries and if tribal council jurisdictional authority can be clearly and precisely defined.

Montana.—No established state statute or policy to prevent state recognition of tribal court decisions, but policy requirement most likely is that tribal recording methods comply with state recording standards (which standards are not clear). It appears past state policy of undercutting tribal jurisdiction exercise may be pursued with less vigor in the future. But this will depend in part on the analysis given the jurisdiction, water rights, land use, and other matters subject to review of the state-tribal policy Review Task Force created by the governor in 1975.

Arizona.—Before granting recognition of tribal court judgments, scrutiny by due process analysis often occurs. Tribal court generally recognizes state court judgments following like analysis. It appears to be a tendency for the tribal court to recognize state court civil judgments even absent working agreements, but such tendency is not so strong in criminal matters. In at least one case an Arizona court has taken judicial notice of a tribal court judgment. And another

Arizona court has recognized a tribal judgment on the theory that a judgment valid by the law where rendered is valid anywhere. Begay v. Miller, 70 Ariz. 380, 222 p 2d 624 (1950).

Washington.—No full faith and credit afforded all tribal judgments. State leaves recognition up to a county system, e.g. Grey Harbor remands Indian juveniles back to tribal court. State relies on RCWA 37.12.070 to give effect to tribal decisions in civil area if not inconsistent with state policy.

South Dakota.—Attorney general opinion stated that tribal court records aren't given effect by any laws the state nor is there any requirement that the action taken by any recognized tribal tribunal be made a record in any court of the state. Attorney general seemed to infer if a tribal court's record is recognized in the BIA system then the state would tend to recognize that court's records and judgments.

North Dakota.—Counties surrounding Ft. Berthold reservation have given recognition to tribal court child custody orders and tribal court divorce decrees. State appears willing to contract with tribes regarding juvenile detention but state feels no obligation to take Indian juveniles into state facilities absent agreement since tribal members are not subject to the same taxing scheme non-tribal people are subjected to.

New Mexico (Isleta Pueblo).	*Isleta Pueblo* (New Mexico).—Probably not sufficient since opinions and findings of fact are not recorded in every case.
New Mexico (Mescalero).	*Mescalero Apache* (New Mexico).—Probably not sufficient since findings of fact and opinions are not recorded. There is also allowance for limited representation in court by any community member.
North Dakota (Ft. Berthold).—Some state officials have expressed the view that lack of legally trained judges would justify non-recognition absent satisfying due process scrutiny.	*Ft. Berthold* (North Dakota).—Existing recording methods are not sufficient to gain a blanket recognition of tribal court judgments in North Dakota.

Are there formal or informal extradition arrangements between state and tribe?	*What are the procedures used for extradition?*
Leech Lake (Minnesota).—None, P.L. 280 more or less preempts the area; tribe and state department of natural resources have a reciprocal arrangement of cross-deputization under which arrested Indians by (DNR) appear in tribal court; and tribal wardens arrest non-Indians who go to state court.	*Leech Lake.*—P.L. 280 authority provides state with procedures.
Rocky Boys (Montana).—No agreement at present; reservation police have in past allowed extradition to state without any agreement; no cross-deputization.	*Rocky Boys.*—Question not applicable because no extradition arrangements exist.
Gila River (Arizona).—Informal working agreement regarding extradition. No formal state agreement regarding tribal extradition arrangements.	*Gila River.*—Tribal judge issues tribal warrants allowing state officer to arrest. The state take tribal warrants and give to state police to arrest individual off reservation.
Quinault (Washington).—No formal or informal extradition arrangements; cross-deputization agreement exists.	*Quinault.*—Tribe allows extradition to state or county courts when the state or county officials bring in a warrant. Tribal judges review the warrant. County or state officer is then to be accompanied by tribal officer, to make arrest.

Cheyenne River (South Dakota).—No formal extradition arrangements. The tribe has a provision for formal extradition for the state, but the state has none for the tribe.	*Cheyenne River.*—Following an extradition request by state the tribal judge is to examine for probable cause to extradite and to determine whether the individual involved in all probability be given a fair trial in the state court. If these probable cause fair trial elements are satisfied an extradition request by the state can be granted.
Isleta Pueblo (New Mexico).—No formal extradition agreement. Cross-deputization with two counties.	*Isleta.*—Review for extradition purposes is generally informal for purposes of information only. Few requests are made and seldom referred to. No established extradition procedures exist.
Mescalero Apache (New Mexico).—Informal extradition policy; very seldom applied or necessary. No cross-deputization.	*Mescalero.*—Tribal judge makes a review of the State or county warrant.
Ft. Berthold (North Dakota).—No formal extradition arrangements. No informal arrangements either.	*Ft. Berthold.*—Tribe holds people for the county. Tribal judge views a verified copy of the complaint and a verified copy of the warrant from the state or county for authenticity and to determine whether the person held is the proper person as named in the complaint and warrant.
Ft. Belnap (Montana).—No extradition arrangement even though tribe has its own extradition ordinance.	*Ft. Belnap.*—Warrant served by state to tribal judge who reviews and issues an order for arrest. Defendant taken into custody by BIA or tribal police until state officers arrive.

Are procedures established by Tribe or by State?	*What is extent of inquiry before tribe grants extradition request?*
Leech Lake.—Not applicable.	*Leech Lake.*—Not applicable; need hasn't arisen because of Public Law 280 status of tribe.
Rocky Boys.—None existing at present except the Uniform Extradition Act which Montana applies to other state requests.	*Rocky Boys.*—Not applicable; any extradition in past has been without order of tribal court and has been to state, not to tribe.
Gila River.—Tribe and state both have established informal extradition procedures.	*Gila River.*—Judge reviews the merits of the charge and findings.
Quinault.—No tribal extradition procedures. And state has no established procedure for extradition to and from Indian reservations.	*Quinault.*—Tribal judge reviews the warrant and questions the state official requesting extradition to determine validity of the warrant.
Cheyenne River.—Tribe has extradition procedure provision in Code. State has no formal agreement with tribe. For the tribal court to grant extradition requirements are proof of probable cause and the state must show that there will be a fair trial in state court.	*Cheyenne River.*—Inquiry as to probable cause to extradite and whether individual will be afforded a fair trial in state court system.
Isleta.—Tribe has informal, flexible, discretionary procedures of extradition request handling.	*Isleta.*—Tribal judge generally grants state or county extradition requests without extensive inquiry except as to authenticity.

Mescalero.—Tribal policy of review primarily for information purposes and authenticity. No state procedure regarding extradition to and from the reservation.	*Mescalero.*—Information review and determination as to authenticity of warrant.
Ft. Berthold (North Dakota).—No formal extradition arrangements. No informal arrangements either.	*Ft. Berthold.*—Tribe holds people for the county. Tribal judge views a verified copy of the complaint and a verified copy of the warrant from the state or county for authenticity and to determine whether the person held is the proper person as named in the complaint and warrant.
Ft. Belnap (Montana).—No extradition arrangement even though tribe has its own extradition ordinance.	*Ft. Belnap.*—Warrant served by state to tribal judge who reviews and issues an order for arrest. Defendant taken into custody by or tribal police until state officers arrive.

Are procedures established by Tribe or by state?	*What is extent of inquiry before tribe orders extradition request?*
Leech Lake.—Not applicable.	*Leach Lake.*—Not applicable; need has not arisen because of Public Law 280 status of tribe.
Rocky Boys.—None existing at present except the Uniform Extradition Act which Montana applies to other state requests.	*Rocky Boys.*—Not applicable; any extradition in past has been without order of tribal court and has been to state, not to tribe.
Gila River.—Tribe and state both have established informal extradition procedures.	*Gila River.*—Judge reviews the merits of the charge and findings.
Quinault.—No tribal extradition procedures. And state has no established procedure for extradition to and from Indian reservations.	*Quinault.*—Tribal judge reviews the warrant and questions the state official requesting extradition to determine validity of the warrant.
Cheyenne River.—Tribe has extradition procedure provision in Code. State has no formal agreement with tribe. For the tribal court to grant extradition requirements are proof of probable cause and the state must show that there will be a fair trial in state court.	*Cheyenne River.*—Inquiry as to probable cause to extradite and whether individual will be afforded a fair trial in state court system.
Isleta.—Tribe has informal, flexible, discretionary procedures of extradition request handling.	*Isleta.*—Tribal judge generally grants state or county extradition requests without extensive inquiry except as to authenticity.
Mescalero.—Tribal policy of review primarily for information purposes and authenticity. No state procedure regarding extradition to and from the reservation.	*Mescalaro.*—Informational review and determination as to authenticity of warrant.
Ft. Berthold.—The only existing extradition procedures are set forth in the tribal Code. North Dakota has no established procedures for extradition to and from an Indian reservation.	*Ft. Berthold.*—The tribal judge views the complaint and warrant to determine authenticity and whether the person named therein is the proper person. This amounts to only an informal informational review by the tribal judge who grants the extradition request unless dissatisfied with the state or county complaint or warrant contentions.

Ft. Belnap.—State procedures under Uniform Extradition act. Tribe's under section 15 of their own extradition ordinance. Montana takes the view that there is no statutory requirement for state to honor tribal extradition requests.	*Ft. Belnap.*—Hearing in tribal court to review date, charge and person named to determine the validity of warrant.

Is there any differences in tribal extradition procedures when non-Indians are involved?	*What type of extradition agreement would be acceptable by both state and tribe?*
Leech Lake.—No, because Minnesota has Public Law 280 jurisdiction over any person on the reservation and is subject to state criminal and civil jurisdiction.	*Leech Lake.*—No need for agreement in light of Public Law 280; but it may be anticipated that greater recognition by tribes of inherent powers of jurisdiction and sovereignty may lead to greater assertion of tribal jurisdiction in Minnesota by tribes, including Leech Lake. (Note: Nett Lake retrocession Public Law 280 completed in 1973).
Rocky Boys.—Not applicable because no formal extradition procedures have been applied in past and tribal court has not exercised jurisdiction over non-Indians.	*Rocky Boys.*—If state agrees, tribe would allow but both tribe and state would desire to screen any extradition requests. Potential in Montana appears good for reciprocal arrangements. Pressing issues in state-tribal relations have prompted creation of the governor's task force to study state-tribal relations and legal matters common to both.
Gila River.—No different procedures; the Gila River Community Court exercises jurisdiction over any person on the reservation and applies tribal policies in relation to the court in a manner consistent with the reach of jurisdiction.	*Gila River.*—There are existing working agreements with Pinal and Maricopa counties which appear satisfactory for county and tribes.
Quinault.—No difference in procedures. Quinault has for a number of years been exercising jurisdiction over non-Indians in tribal court. Tribal laws are applied to all before the court and there are few appeals. The cross-deputization and working relations with surrounding counties limit the number of extraditions.	
	Cheyenne River.—No difference is noted in the tribal extradition provision.
	Ft. Berthold.—No difference in procedures but under the cross-deputization agreement non-Indians are turned over to the county court systems upon arrest so few non-Indians are tried in tribal court at present.
	Ft. Belnap.—No difference. The tribal extradition ordinance operates unilaterally. The state and tribe have no formal arrangements and Ft. Belnap has not exercised jurisdiction over non-Indians in the past.

Isleta.—No apparent difference when non-Indians involved. Tribe does not exercise jurisdiction over non-Indians so state requests for such individuals are routinely granted.

Mescalero.—No apparent difference if non-Indians are involved in criminal matters on the reservation; such person is normally transferred to the state or county.

Quinault.—It appears tribe would be susceptible to agreement with state but it appears that tribal-county agreements would be more acceptable to the state. One way extradition as exercised in the past is no longer acceptable to the Quinault Tribe.

Cheyenne River.—State would agree to extradition and other reciprocal arrangements with the tribes if "true reciprocity" could be arranged, i.e., full mutual cooperation; and South Dakota would recognize tribal court judgments if the tribe can convince the state that tribal court proceedings take place in what the attorney general of South Dakota views as "certified courts", i.e. certified by the BIA or by state due process standards.

Ft. Belnap.—Tribe has passed an extradition ordinance but state has no knowledge of its existence. (see Rocky Boys analysis above).

Isleta.—Tribal judges are willing to establish agreements of extradition, cross-deputization, general reciprocal arrangements but skepticism exists regarding the willingness of state and county officials to make recognition and agreements on a two-way basis.

Mescalero.—Judges appear content with the present situation regarding extradition. Tribe has seldom found a need for extradition procedures or requests in the past and appear content to extradite to state or county based on a minimal review of the state or county warrant.

APPENDIX B.—ANALYSIS OF *JIM* VERSUS *CIT* (553 P. 2ND 751 (1975))

Title 28 U.S.C. § 1738 provides that: "The records and judicial proceedings of any court of any . . . State, Territory or Possession (of the United States) . . . , or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.[1]

In *Jim* v. *CIT Financial Service Corp.*,[2] the New Mexico Supreme Court held that the Navajo Nation was a territory for purposes of 28 U.S.C. § 1738; consequently its records and judicial proceedings were entitled to full faith and credit recognition under the statute.

Appellant Allan Jim, an enrolled member of the Navajo Nation, purchased a pickup truck in Farmington, New Mexico. Appellee CIT Financial Services Corp., a national corporation, financed the purchase of the truck. Appellant lived on the reservation and kept the pickup on the reservation. Jim failed to make the necessary payments on the truck as required by the contract. Then Appellee without filing either a replevin or any other form of action in the Navajo Tribal Court or in the New Mexico State Courts, sent two agents onto the Navajo reservation to repossess the pickup.

Jim then filed in the New Mexico District Court for San Juan County (an action) which was based upon §§ 307[3] and 309[4] of the Navajo Tribal Code. § 307 of the Code provides that, in order to repossess "personal property" of Navajo

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[1] USC, Bluebook says to cite as USC rather than USCA. § 1738. *State and Territorial statutes and judicial proceedings; full faith and credit.* The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possessions from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

[2] § 87 NM 362, 553 P. 2d 751 (1974). Navajo Tribal Code, Title VII, § 307 (1969) (86 NM 784, 527 P. 2d 1222(NM App. 1974)).

[3] § 307. *Repossession of personal property.* The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession except in strict compliance with the following:

(a) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.

(b) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal legal proceeding.

[4] § 309. *Civil liability.* Any person who violates section 307 of this title and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with sections 307–309 of this title.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price. Purchaser means the person who owes payment or other performance of an obligation secured by personal property, whether or not the purchaser owns or has rights in the personal property.

Indians or tribal land, written consent at the time of repossession, possession or an order of the tribal court "in an appropriate legal proceeding is required." § 309 provides a remedy for those whose rights have been violated under § 307 the "purchasee" may recover "an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time price differential plus ten percent (10%) of the cash price."

The District Court[5] dismissed the action for failure to state a claim upon which relief could be granted, presumably based on the theory that New Mexico law applied rather than the Navajo Tribal Code. Under the Uniform Commercial Code, which New Mexico has adopted, CIT had the right to peaceable, self-help repossession.

On appeal,[6] the majority of the panel affirmed the district court's action, even though they were unable to agree on a single basis for the affirmance. However, both those concurring and dissenting in the opinion did agree that the crucial issue was whether or not the Navajo Nation was a "Territory" within the meaning of 28 U.S.C. § 1738.

The New Mexico Supreme Court reversed by holding that 28 U.S.C. § 1738 was applicable, but it did so in a rather cursory manner by simply citing *Mackey et al.* v. *Coxe*[7] and *Americana of Puerto Rico, Inc.* v. *Kaplus*[8] and by agreeing with the initial reasoning of Judge Hernandez of the Court of Appeals.[9]

This decision is not without some controversy. The controversy swirls around three principal issues: (1) was whether Indian tribes were to be considered territories within the meaning of the FF & C clause of the Constitution,[10] (2) was whether Indian tribes are territories under subsequent legislative interpretations of the FF & C clause,[11] and (3) was whether subsequent Congressional treatment of Indian tribes brought them within the scope of the FF & C principle.[12]

The only interpretations of the meaning of the word territories for the purposes of the 1790 statute and its successors, until *Jim* v. *CIT*, involve the status of the District of Columbia.[13] Since Art. IV only speaks to FF&C between states, the inclusion of territories in the states raised questions of Congress' power to legislate beyond interstate relationship. The issues raised in earlier cases involving the District of Columbia centered around whether the legislation enacted 28 USC § 1738's predecessors, was dependent wholly on Art. IV or whether the power to enact legislation broader than Art. IV was derived from the general judiciary power of the United States.

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[5] 87 NM 362, 363, 533 P. 2d 751, 752 (1975).

[6] Judge Hendley in his opinion for the Court believed that *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973), was dispositive of the issue. In *McClanahan*, Justice Marshall, writing for a unanimous court, held that Arizona could not impose a personal income tax or income derived from reservation source, on a Navajo resident living on the reservation. In reaching this conclusion, Marshall noted that Indian tribes are separate entities from the state in which they are contained. To emphasize this issue he quoted *U.S.* v. *Kagama:*

> But it is nonetheless still true, as it was in the last century, that [t]he relation of the Indian tribes living within the borders of the United States [is] an anamalous one and of a complex character. * * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside. *United States* v. *Kagama*, 118 U.S. 375, 381–382 (1886).

Judge Hendley interpreted Marshall's use of *Kagama* in *McClanahan* that Indian Tribes are "semi-independent" nations as evidence that they are not a territories, at least for purposes of 28 USC § 1738.

Judge Hendley's position is that, because the court in *McClanahan* did not specifically denominate the Navajo Nation as a territory, it could not be a territory. He reasoned further that an earlier case, *Mackey et al* v. *Coxe* 59 U.S. (18 How.) 100 (1855), did not control because the court held that the Cherokee Nation was a territory for only certain purposes, VIZ., that its laws authorizing letters of testamentary and administration should be given full faith and credit in the District of Columbia. Instead, Judge Hendley found support for his interpretation of 28 USC § 1738 in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), where the court held that the District of Columbia was not a territory for purposes of a civil rights suit under 42 USC § 1983. In so reaching this conclusion, the court stressed that the concept of territory is one of pupilage, destined for admission as states to the Union and that therefore they should be treated as an inchoate state whereas the District of Columbia is as lasting as the state from which it was carved.

Therefore, Judge Hendley reasoned that, because *McClanahan* spoke of the Navajos as being "semi-independent" and because the definition of territory from the *Carter* case did not include this category, New Mexico did not have to accord full faith and credit to the Navajos. Judge Lopez concurred with the majorities result but found that the applicable law of the Navajo Nation that was requested to be enforced was penal in nature and therefore under existing case law need to be ——. In a dissenting opinion Judge Hernandez argued that because Navajo Nation was a territory within the meaning of 28 USC § 1738 the Navajo Tribal Code should apply in the given action.

[7] 59 U.S. (18 How.) 100 (1855).

[8] 368 F. 2d 341 (3rd cir. 1966).

[9] The court specifically rejected his conclusion at 363.

[10] U.S. Const. Art. IV, §1.

[11] The history of the full faith and credit clause is discussed in Cook, The Powers of Congress Under the Full Faith and Credit Clause, 28 Yale L.J. 421 (1919); Corwin, The Full Faith and Credit Clause, 81.

[12] Act of May 26, 1790, Ch. 11, 1 Stat. 122.

In *Emory* v. *Palmer*, [14] the Court held that the powers to proscribe the effects of judgments were within the general judicial power of the United States and that the Acts of 1790 and 1804 were derived from that power and thus binding on the States. Therefore, Congress' power to proscribe the effects of proceedings and judicial records was constitutionally permissible; the issue as to the status of the District of Columbia was one of statutory construction just as for Indians. In interpreting the statute, the Court found that, for purposes of this statute, the District of Columbia was a territory even though it did not meet the common definition of territory as an "enchoate state".

Emory has a secondary value for determining whether tribes are territories for purposes of the statute. The New Mexico Court of Appeals placed great reliance on the definition of territories in *Carter* [15] in its holding in CIT. There the Court found that the District of Columbia was not a territory for purposes of 42 USC 1983. But *Carter* and *Emory* when read together illustrate the principle that the inclusion of a political entity as a territory depends on the purpose of the statute. In *Emory* it was not required that the legislative history or the Statute mentioned the District of Columbia in order to find it a territory for

Prior to the New Mexico Supreme Court's decision, no Court had examined the status of Indian tribes under the general FF&C statute, even though the status of tribes for other FF&C actions had been litigated numerous times. The leading case in holding that Indian tribes are entitled to full faith and credit is *Mackey et al* v. *Coxe.*[16] Although *Mackey* did not involve the Acts of 1790 or 1804 but rather a provision in the Act of June 24, 1812,[17] which required recognition of administrators appointed from territories, the court reasoned that the Cherokee Nation's letters of appointment for testamentary purposes were entitled to full faith and credit because Indian Nations were territories at least for *the purpose of the 1812 Act.*

The concept of territory in that state is the same as for legislation under the full faith and credit clause. The court reasoned that:

"They [Cherokees] are not only within our jurisdiction, but the faith of the nation is pledged for their protection. In some respects they bear the same relation to the federal government as a territory did in its second grade of government under the Ordinance of 1787. Such territory passed its own laws, subject to the approval of Congress; and its inhabitants were subject to the constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic, territory—a territory which originated under our constitution and laws. . . .

"No question could arise as to the validity of the Cherokee law under which letters of administration were granted on the estate of Mackey; and, as the power of attorney given by the administrator to Raines seem to have been duly authenticated and proved, a payment to the administrator by the government would have been a legal payment. The Cherokee country, we think, may be considered a territory of the United States, within the Act of 1812. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction, and subject to our laws."[18]

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[13] Act of March 27, 1804, Ch. 56, §§ 1 and 2, 2 Stat. 298.

[14] 107 U.S. 3 (1882).

[15] *District of Columbia* v. *Carter*, 409 US 418 (1973).

[16] 59 US (18 How.) 100 (1855).

[17] Act of June 24, 1812, Ch. 106, § 11, 1 Stat. 758. And be it further enacted, that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in any of the United States or the territories thereof, to maintain any suit or action and to prosecute and recover any claim in the district of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said district; and the letters testamentary or of administration, or a copy thereof, certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, hath or have administration.

The Eighth Circuit Court of Appeals, in the late nineteenth century,[19] adopted the same position in a number of cases involving ejectment, wrongful detainer, the dismissal of an injunction, quarantine regulation, divorce, use tax, and probate proceedings.[20] The Eighth Circuit Court of Appeals recognized that the proceedings of Indian tribal courts were entitled to full faith and credit as were any other territorial court, since the tribes were considered to be distinct political societies capable of managing their own affairs. Throughout the amendments and recodification of the full F&C statutes no mention of their relationship to Indians was made. Even if this silence cannot be taken as Congressional acquiescence to the earlier judicial decisions on the subject, it is enough to note that these decisions have never been legislatively overruled.

With the exception of *Mackey*, none of the cases holding FF&C for tribes discuss relevant legislation enacted under either Art. III or Art. IV.[21] Consequently, the relationship between the cases and 28 U.S.C. § 1738 is tenuous at best.

The statute in question, 28 U.S.C. § 1738, was passed as a result of the general code revisions in 1948.[22] Although there had been changes made in the existing legislation from the inclusion of the word territory in 1804 through 1948, the application of full faith and credit to territories was not affected. The purpose of the general code revision, as it related to federal courts, was to solidify the various provisions that had been adopted since 1911 and scattered through the U.S. Statutes.[23] The purpose of the revision was specifically not to make substantive changes in the language so as to effect the substantive law.[24] Congress' silent recodification of 28 U.S.C. § 1738 would indicate a tacit acceptance of the existing statutory and case law on full faith and credit as it relates to Indians.

The leading case supporting the proposition that tribes are not entitled to full faith and credit is *Begay* v. *Miller*,[25] an Arizona Supreme Court case. Petitioner Begay filed a habeas corpus petition against Miller, a sheriff of Apache County, to secure release from jail after having been found guilty of contempt by an Arizona court for failure to pay alimony pursuant to an Arizona divorce decree. Begay and his wife had obtained a divorce from the Navajo tribal court and then another divorce from the Airzona Superior Court which awarded the alimony that led to the contempt conviction.

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[18] 59 U.S. (18 How.) 100, 103–104 (1855).

[19] The creation of the 10th Circuit in 1929 made most of these cases 10th Circuit precedent rather than Eighth since they arose in States presently within the 10th Circuit jurisdiction. Act of Feb. 28, 1929, Ch. 363, § 116, 45 Stat. 1346.

[20] *Mehlin* v. *Ice*, 56 F. 12 (8th cir. 1893). *Exendine* v. *Pore*, 56 F. 777 (8th cir. 1893). *Standley* v. *Roberts*, 59 F. 836 (8th cir. 1894), appeal dismissed 17 S.Ct. 999 (1896). *Cornells* v. *Shannon*, 63, F. 305 (8th cir. 1894). *Raymond* v. *Raymond*, 83 F. 721 (8th cir. 1897). *Buster* v. *Wright*, 135 F. 947 (8th cir. 1905). *Hayes* v. *Barringer*, 168 F. 221 (8th cir. 1909). *Iron Crow* v. *Oglala Sioux Tribe*, 129 F. Supp. 15, 21 (W.D.S.D. 1955) aff'd. 231 F. 2d 89 (8th cir.). Two scholars have observed that Indian tribes were entitled to full faith and credit. Felix Cohen, the foremost scholar of Indian law. F. Cohen, Handbook of Federal Indian Law, 145 (University of New Mexico Press Reprint 1971).

[21] G. Colligan, The History and Adoption of Section I of Article IV of the Construction of the United States, and a consideration of the effect of Judgments on that section and Federal Legislation. 4 Col. L. Rev. 470 at 482.

[22] Materially unchanged, the contents of the acts reappeared in the Revised Statutes of 1875, Title: "Judiciary," Chapter: "Evidence," sections 905 and 906, the first dealing with authentication of legislative acts and proof of judicial proceedings of states etc., and the second with authentication of records which are not court records. Both had the closing sentence:

"And the said records and judicial proceedings [906: records and exemplifications,] so authenticated, shall have such faith and credit given them in every court [906: court and office] within the United States as they have by law or usage in the courts [906: courts or offices] of the State, [906 Territory, or country, as aforesaid,] from which they are taken."

The two sections became sections 687 and 688, respectively, of Title 28: "Judiciary," in Chapter: "Evidence," of the United States Code 1926.

[23] K. Wright, Federal Courts 13 (2nd ed. 1970).

[24] The chairman of the Committee on Revision stated that the policy of the revision was avoidance wherever possible and whenever possible of the adoption in the revision of what may be described as controversial substantive changes of the law. In the opinion of the chairman, that policy had been very carefully adhered to. The chief reviser declared that extreme care had been taken to make no changes of substantive law concerning which there might be any controversy. Similarly, representatives of the advisory committees assured the legislature that care had been taken to make no changes in the existing laws which would not meet with substantially unanimous approval, and that departures from the strict letter of existing statutes represented improvements of a non-controversial character. 56 Mich. L. Rev. 82 (footnote omitted).

"Neither he [a consultant] nor any one else mentioned the changes derived from the Acts of Congress in 1790 and 1804, nor were there changes made in the debates in congress." 56 Mich. L. Rev. 82.

[25] *Begay* v. *Miller*, 70 Ariz. 380, 222 P. 2d 624 (1950).

The Arizona Supreme Court held that the Navajo decree must be recognized; therefore, the Arizona divorce was invalid. The court reasoned that if both parties were properly before the tribal court then Arizona would recognize the divorce "because of the general rule, call it by whatever name you will, that a divorce valid by the law where it was granted is valid anywhere." [26] The court, in reaching this conclusion, argued that tribes were not constitutionally entitled to full faith and credit because Art. IV refers only to States. The court ignored 28 U.S.C. § 1738 and the case which held that tribes were entitled to full faith and credit. The court also said that comity was not applicable because it "presupposes two independent sovereigns." [27] Arizona has since partially retreated from this position and in *In re Lynch's Estate*,[28] the Supreme Court held that a Navajo will, having already been admitted to probate in an Indian court, should be accorded the same force and effect as a will probated originally in an Arizona state court. The court's reasoning is worth noting since it essentially supports the independence of government argument in *Mackey*.

"[ARS] Section 14–343 . . . provides that the will *shall be admitted* to probate in another state or foreign country. The Navajo Indian Tribe is not strictly speaking " 'another state or foreign country,' " but there can be no question that its courts have a separate jurisdiction from the Arizona courts. Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); reversing Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958), is in point. The United States Supreme Court, speaking generally of the treaty between the Navajo Nation and the United States Government, stated:

"Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worchester v. State of Georgia [6 Pet. 515, 8 L.Ed. 483], was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts."

We are therefore of the opinion that the proceedings held in the Navajo Tribal Court must be treated the *same as* proceedings in a court of another state or foreign country . . .[29]

Arizona's backpedaling from their position in *Begay* to a position of at least comity, which was based primarily on the decision in *Williams* v. *Lee*,[30] is reflective of the underlying policy that a tribe's laws should be accorded full faith and credit.

It is the uniformity of reasoning in the above cases that is important. There is no longer as issue as to the legitimacy of Indian tribal government or to the validity of Indian courts, and with the passage of the Indian Civil Rights Act of 1968,[31] many of the Anglo preceived weaknesses of the courts have been corrected.

Art. IV, Sect. 1 of the Constitution was incorporated by the framers of the Constitution out of a vaguely articulated need to control relationships between the States rather than to extend mere comity to the law of nations.[32] One of the ironies of American history is that the debates regarding the Articles of the Confederation, the predecessor of the Constitution, were more concerned with the relationships between states and the ultimate disposition of western lands than they were with the more pressing issues of potential defeat by the British forces or by the Indians of the West.[33] (One major concern in this relationship between States was the concept of full faith and credit.) The States under the Articles of Confederation were considered separate sovereignties contemplating a perpetual union. Nonetheless, However, the framers of the Constitution realized that in order to survive, the relationship of States must be based on something stronger than the law of nations as reflected in Art. IV of the Articles of Confederation. Although full faith and credit was just one element of concern, its role in the interrelationship of states can be better understood within the entire context of Art. IV:

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[26] Id. 628. *C. F. Alton v. Alton*, 207 F. 2d 667 (3rd cir. 1953), appeal dismissed as moot 347 U.S. 610, 74 S.Ct. 736, 98 L.Ed. 987.

[27] Id. 628. Since a court can recognize other courts' laws and judgments only through comity or full faith and credit, it is difficult t ounderstand exactly what the court thought it was doing in recognizing the divorce while explicitly denying FF&C or Comity.

[28] 92 Ariz. 354, 377 P. 2d 199 (1962).

[29] Id. 201.

[30] 358 U.S. 217 (1959).

[31] 25 USC §§ 1321 ——.

[32] A. McLaughlin, A Constitutional History of the United States, 127 (1936).

[33] 39 Ill. L. Rev. 1, 11–17.

"**Art.** 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.

"If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice and be found in any of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

"Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." [34]

As can be seen, the full faith and credit provision is only part of a contemplated relational scheme between "semi-sovereign" entities. The need for full faith and credit was more than judicial economy; concepts of European comity were made mandatory to promote congenial relationships between the States. Because of this need, full faith and credit from Art. IV of the Articles of Confederation was adopted into the Constitution in 1789.[35]

The present relationship between states and Indian reservations is not unlike that which existed between the States in the Confederation in 1778. The mutual interests of both the states and the tribe(s) are better served when the processes of resolving conflicts are institutionalized. A change in any factor may affect the application of a jurisdiction's law. It is this often confusing jurisdictional morass that magnifies problems between states that are relatively simple to cases when it involves Indians and the State.

With the Supreme Court's unanimous decision in *McClanahan* v. *Arizona Tax Commission* [36] which held that Arizona was without power to impose or collect income taxes on an Indian living on the reservation on income derived from reservation sources, it is apparent that the problems of relationships caused by degrees of self-government of the State and the tribe shall continue.

The inclusion of tribes into the FF&C recognition procedure is one method to alleviate some of the tension that exists between states and tribes, since a large part of the acrimony results from the barriers that jurisdiction creates to impede the normal relationship between citizens. Full faith and credit, if mutually afforded between these entities, should alleviate some problems if only on a personal level. Tribes presently are exercising more of their residual powers; these powers are very similar to the general powers of a State municipally and are not dependent on race. This extension of tribal power into a geographical concept rather than a subject matter concept and its acceptance by the judicial, legislative and executive branches of government, mark an historic change in the position of Indian tribes in America. Almost wihout exception, past policies of the United States towards Indians have treated Indians as a transient phenomenon. Indians were considered a temporary problem that eventually would be absorbed into the melting pot of America. The major policy issue in America as to Indians has been aptly characterized as a dispute as to whether to civilize and then Christianize or to Christianize and then civilize Indians.[37] But this is clearly no longer true. What has become apparent in the last decade is the realization that Indians and Indian tribes are not going to disappear.

With this change in policy it is necessary for all parties concerned to begin to integrate tribal government into the permanent fabric of America; Full Faith and Credit provides a beginning for institutionalizing this process. Each entity retains a degree of self-government, protected like a pristine jewel from encroachment from the others, but because of the unique status of States and tribes that has evolved, the degree of intercourse between citizens of States and tribal members is more volatile than that existing between citizens of different States. Reservations are physically within the geographic boundaries of States. Tribal members are citizens of the United States and the State in which they live. They are enttiled to all the privileges and immunities of a U.S. citizen.[38] But they also are entitled to certain privileges and protections, for example their properties on the reservation are exempt from State taxes[39] and income earned on the reservation is exempt from State income tax[40] and State sale tax.[41] The reservation itself is also immune from certain State activities such as zoning laws, building codes,[42] eminent domain,[43] and most importantly, certain areas of criminal and civil jurisdiction. With each of these considerations as to which law control a particular activity in individual inquiry must be made.

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[34] U.S. Art. of Confed., Art II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

[35] Supra note 33, at 11–17.

[36] 411 U.S. 164 (1973).

[37] A. Berkhofer, Salvation and the Savage 5 (1972).

It is important that States, tribes, and the federal government begin by institutionalizing present inter-governmental relations and developing new institutions where none presently exist. FF&C between tribes and States is an example of this development. Although it has great practical application, its major benefit would be in its legitimatizing influence on States as to the status of Indian tribes within the frame work of the American system.

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[38] See *Felix* v. *Patrick*, 145 U.S. 317 (1892); *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456 (1948), Citizenship Act of 1924.

[39] See *United States* v. *Rickert*, 188 U.S. 432 (1903).

[40] See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973).

[41] See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965).

[42] See *Snohomish County* v. *Seattle Disposal Company*, 425 P. 2d 22 (Wash. 1967) and 25 CFR 1.4.

[43] See 25 U.S.C. § 311–328.

APPENDIX C.—PROJECT STAFF AND PARTICIPATING INTERNS

Staff

Alan Parker (Chippewa-Cree)—Project Director. Robert B. LaFountain (Chippewa)—Project Coordinator.

Interns

Hilda A. Manual (Papago).—University of New Mexico School of Law. Researched at Gila River, Isleta Pueblo, and Mescalero Apache.

Duane T. Bird Bear (Mandan-Hidatsa).—University of Denver School of Law. Researched at Fort Berthold Reservation in North Dakota.

Robbi Huddleston Ferron (Rosebud Sioux).—University of South Dakota School of Law. Researched at Cheyenne River Reservation in South Dakota.

Warren W. Heisler, Jr. (Chippewa).—University of Minnesota School of Law. Researched at Leech Lake Reservation in Minnesota.

Tim LaFrance (Chippewa).—University of California School of Law. Researched at Quinault Reservation in Washington.

Anthony F. Little (Rosebud Sioux).—Researched at Gila River Reservation in Arizona.

Frank A. Ryan (Gros Ventre).—Researched at Ft. Belknap Reservation in Montana.

Clifford B. Shilling, Jr. (Pawnee-Choctaw).—Researched at Rocky Boys Reservation in Montana.

APPENDIX D.—PARTICIPATING TRIBES

Arizona

Gila River Indian Community.—Located in the Pinal-Maricopa County areas of Southern Arizona, the reservation has an approximate population of 9,000 on a land base of about 372 thousand acres. The tribe administers an active tribal court and law enforcement system. Gila River, an I.R.A. tribe, for a number of years has been asserting jurisdiction over all persons within reservation boundaries and maintains working relationships with surrounding counties regarding court cases and law enforcement. The tribe has had little, if any, difficulty enforcing its implied consent ordinance even over non-Indians. The tribe is composed of Pima and Maricopa Indians. The tribe has modern court facilities and an Indian attorney available full time. Tribal headquarters are in Sacaton, Arizona.

Montana

Ft. Belknap Reservation.—Located in the North-central part of Montana this reservation is made up of approximately 2,000 Gros Ventre and Assiniboine tribal members living on a land base of a little over 1,000 square miles or about 616 thousand acres. Tribal headquarters for this tribe are at Harlem, Montana. Tribal court facilities and jail facilities exist and jurisdiction is presently exercised only over tribal members.

Rocky Boys Reservation.—Located near Havre, Montana in the north-central part of Montana, Rocky Boys has a resident population of approximately 1,600 and a land base of 107,613 acres held in trust. The tribe has its own law enforcement and court program and has asserted very little jurisdiction over any person other than tribal members. The tribe has no full-time attorney but does have part-time counsel on retainer at present. No permanent court-room facilities exist. Tribal members of this I.R.A. tribe are primarily of Chippewa and Cree descent and the tribe is known as the Chippewa-Cree tribe. Tribal headquarters are located in a new multi-purpose building which is shared with the B.I.A. at Rocky Boys.

Minnesota

Leech Lake Reservation.—The Reservation is located in the north-central area of Minnesota and has a resident population of approximately 3,000 on a land base of about 26,000 acres. The tribal court is a conservation court with primary civil and criminal jurisdiction resting in the State of Minnesota under P.L. 280. Tribal members of this I.R.A. tribe are members of the Minnesota Chippewa Tribe. Tribal headquarters are at Cass Lake, Minnesota.

New Mexico

Isleta Pueblo.—Located in the center part of the State of Arizona, this reservation has a resident population of about 2,700 on a land base of approximately 210,900 acres. The tribe has a tribal court and law enforcement system which asserts jurisdiction only over Indians on the reservation.

APPENDIX XI.—GILA RIVER INDIAN TRIBAL COURT SYSTEM CASE STUDY

This paper is the result of observations and interviews taken during December and January of 1975 and 1976 with the Chief Justice of the Gila River Community Court, William Roy Rhodes: certain law enforcement officers of the Gila River Tribal Police, and others.

Incorporated within the body of this paper are observations and conclusions drawn during the summer of 1975 while a field representative for the American Indian Lawyers Training Program at the Gila River Indian Community.

Introduction

This paper will attempt to describe the present status of the Gila River Indian Community Court (GRCC) relative to its operations with the Gila River Indian Community Council, the state courts of Arizona, state law enforcement systems of Arizona and the Gila River Indian Community Police.

I. Status of Gila River Indian Community Tribal Court

The Gila River Indian Community Court (GRCC) is at the present time a most vital element in the tribe's exercise of its powers of self-government. Since the passage of a tribal ordinance granting criminal jurisdiction over non-Indians who may commit crimes on the reservation, the need for an effective tribal court system is evident. At a time in their history when the Gila River Community has experienced a modest amount of economic development, the requirement of exercising its powers of self-government has made the tribe strengthen its judicial and law enforcement systems.

There has been an increasing amount of non-Indian participation on the reservation due to tribal exploitation of its resources. Non-Indian participation has also occurred because of the unique location of the Community to the Phoenix Metropolitan area. The need for non-Indian expansion has created an encounter between the Indian and non-Indian. Therefore, it is clear that the Gila River Community Court shall play an even more important role in the future if the Gila River Community is expected to deal with this expansion in an orderly fashion.

II. General Discussion of the Problem

The Gila River Indian Community Court has been thought to be a "model" by which other tribes seeking a more forward look in their exercise of self-government would attempt to emulate. However, the GRRC is not without its own problems.

The GRCC has achieved its niche in the continuum of tribes exercising powers of self-government only after many years of experience with the surrounding non-Indian communities and an ability to cooperate with them. Successful implementation of tribal ordinances and laws could only be achieved with a mix of competent judges, tribal advocates, law enforcement personnel and other supportive organizations and agencies.

This paper will attempt to show how the Gila River Community has been able to overcome problems inherent in the exercise of powers of self-government relative to the judiciary and law enforcement functions of the tribe.

Consideration must be made of those activities which have enabled the judiciary and law enforcement systems to perform efficiently and draw some conclusions as to how they can be made more effective in order to strengthen tribal government. It should be noted that the Gila River Indian Community's acknowleged status as a model in the area of tribal law enforcement and judiciary systems is probably unique. However, it is a model upon which other tribes may seek to imitate and be able to structure their systems accordingly. In most cases, total emulation of the Gila River model will not occur because

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of the aforementioned cooperative efforts made between the non-Indian community and by the Gila River Indian Community.

The degree of cooperation has only come after many years of interaction with surrounding communities and is more defined in the criminal law enforcement area than in the civil area.

The following are observations and conclusions drawn during the study. These observations shall be discussed topically and are not meant to be viewed giving importance to one rather than another but rather in the totality in which they exist in the law enforcement and judiciary function of the tribe.

III. Discussion

A. TRIBAL COURT AND THE CONSTITUTIONAL BASIS

The Gila River Community Court consists of a Chief Judge, and at the present time, two Associate Judges. With the recent opening of the West End Judicial Center Facility at St. Johns, Arizona, on the Gila River Reservation, the Court shall be able to hear cases from that area. Under the proposed scheme of things, the Chief Judge shall have offices at the West End facility and hear most of the cases as they arise. The Court at Sacaton, Arizona shall have the recently elected Associate Judges Nelson Jose and Ray Sundust. The exact appointment of cases has not been made in view of the relatively inactive caseload at the West End facility.

The judges' qualifications are set forth in Art. VI of the Gila River Constitution and Bylaws which were approved March 17, 1960 and hereinafter referred to as the Constitution:

"SEC. 1. No person shall be elected or hold office as Governor, Lieutenant Governor, Chief Judge, Associate Judges, or Councilman unless he (1) is a member of the Community; (2) has reached the age of twenty-five (25) years; (3) has been living in the particular district he is to represent for at least sixty (60) days immediately preceding the election; (4) has been living on the Reservation for at least one year immediately preceding the election. Additional qualifications may be prescribed by ordinances.

"SEC. 2. No person who, within the year preceding the election, has been convicted of a crime shall be eligible to hold office in the community."

The tenure of office of the Chief Judge and Associate Judges can be found in Art. VIII—"Tenure of Office" in the Constitution:

"SEC. 2. The Governor, the Lieutenant Governor, the Chief Judge and Associate Judges shall be elected from the Community at-large for a term of three (3) years. They shall take office the first day of January following their election, and shall serve until their respective successors have been duly elected and qualified. * * *"

Vacancies in office are covered by Art. IX of the Constitution relative to the judiciary:

"SEC. 2. The Council shall declare that a vacancy exists when a Governor, Lieutenant Governor, Chief Judge, Associate Judge, or Councilman is removed for cause, resigns, moves from the Reservation, or when a Councilman moves from the district he represents.

"SEC. 4. Should a vacancy exist from any cause whatsoever in the office of Lieutenant Governor, Chief Judge, Associate Judge, or Councilman, a successor shall be elected at a special election called by the Council within sixty (60) days after the vacancy occurs. The successor shall hold office until the expiration of the regular term of his predecessor. Should a vacancy occur within six (6) months or less of the regularly scheduled election, the Council may waive the special election and allow the vacancy to exist until the successor is elected at the regularly scheduled election."

Elections are covered under Art. X of the Constitution:

"SEC. 1. The election of the Governor, the Lieutenant Governor, the Chief Judge and the Associate Judges shall be held trienially on the first Tuesday after the first Monday in November, beginning November, 1960."

See generally, Art. XII, "Removal From Office".

Art. XV enumerates the powers of the GRIC Council and includes *inter alia:*

"(17). To provide for the maintenance of law and order and administration of justice by establishing a Community Court and police force and defining the powers and duties thereof." Sec. 1(a)(17).

The above power relative to the judiciary is "subject to any limitation imposed by * * * applicable statutes of the United States and subject further to all expressed restrictions upon such powers contained in this Constitution," and are not subject to review by the Secretary of the Interior, except where specifically required by law. Art. XV. Sec. 1.

Another power of the Council relative to the judiciary and subject to review by the Secretary of the Interior is:

"Sec. 1(b)(8). To enact criminal and civil codes or ordinances governing the conduct of members of the Community and non-members on the Reservation. and,

"Sec. 1(b)(10). To pass ordinances necessary or incidental to the exercise of any of the foregoing powers."

The Bylaws of the Gila River Indian Community appear to be the only area where the powers and duties of the judiciary are enumerated:

"Sec. 6. The duties and jurisdiction of the Chief Judge and Associate Judges will be enumerated and set forth in ordinances of the Council."

The judiciary, therefore, receives its powers from a grant of the Council giving the Tribal Court jurisdiction over those matters by way of legislation. The judiciary may be without power to hear certain cases absent a grant from the Council extending review power. However this is unclear in all cases.

B. JUDICIAL REVIEW

As has already been expressed, it is not clear whether the Council can exclude all legislation from review by the judiciary. During interviews with Chief Justice William Roy Rhodes of the GRCC I asked him whether it was possible that the Council could "take back" jurisdiction from the Court in view of the fact that they received that grant of jurisdiction from the Council initially. Although there has never been an opportunity for the Court to decide upon the constitutionality of any action by the Council, he felt that this type of activity (i.e., stripping the Court of its jurisdiction) might be unconstitutional.

The Chief Justice could only relate to me one instance in which he felt review of legislative action was needed. This action was on an informal level. Approximately three years ago the GRCC bookkeeper questioned the times being turned in by Associate Judges Thompson and Chase. At this particular time (May), Associate Judges Thompson and Chase had an unusually large caseload. Judge Chase had jurisdiction over juvenile matters and Judge Thompson over traffic and other areas. Chief Judge Rhodes turned in their times and the checks had been made up. Associates receive per diem of $25 per day during the times they actually sit. Both judges devoted their full time to hearing cases. The bookkeeper questioned this and thought both judges were sitting in on the same cases. She brought this to the attention of the Governor.

The Governor withheld the payroll checks pending an investigation. Chief Judge Rhodes then issued an order demanding the Governor to release the checks within the hour or else the court would "take steps". These "steps" were not taken and it appears to have been a confrontation between the Governor and the Chief Justice. The checks were subsequently released. At a meeting held later, Judge Rhodes showed the Governor a list of the various cases each had sat in on and that they had been on separate dockets. This incident is the only time at which an activity of the Executive branch of Gila River Community was viewed by the judiciary as an *ultra vires* act. As was earlier stated, this act was not reviewed formally and there has been no other time at which the Court has had to review the activity of either the Legislative or the Executive branches of the Gila River Community.

C. INDEPENDENT TRIBAL COURT

The tribal court derives its powers, and duties are enumerated, in the constitution Bylaws. This suggests that to an extent, the tribal court may be very dependent upon the discretion of the Council as to whether or not it shall receive jurisdiction and have power to review certain activity. The Chief Justice has indicated, however, that he feels that the Council could not deprive the Court of its power of review. This factor is very relevant and important in view of the need for an independent judiciary.

The Council has never had the opportunity to deny the Court jurisdiction of those matters within the scope of authority. This does not mean that such an occurrence is impossible but that it is improbable due to the assertiveness of the present judiciary and a level of competence which would actively try to dissuade such activity.

The Chief Justice has stated that the Council has never attempted to place pressure upon any judge so as to bias his opinion. I have had many opportunities in which to view the tribal court system at work and have had on occasion to see tribal councilmen before the Court on a legal matter. In one such instance I say a councilman adjudged liable for breach of contract. A non-Indian had pursued his remedy in tribal court on a contract involving a sale of goods. The treatment which was given the council was no different than any other member of the tribe.

D. COURT PERSONNEL

1. The Chief Justice and his associates

Chief Justice Rhodes has been a judge for the past two terms and since his taking the bench, the attitude of the Court has changed dramatically. His record has been one of positive action toward a goal of tribal self government through the enforcement of tribal ordinances and laws governing members of the tribe and also non-Indians who come under the Court's jurisdiction. He is not one to back down from a charge that justice is not handed down fairly in the Gila River tribal Court. He attempts to deal fairly with all people who come before him and does a respectable job in his handling of cases.

The foregoing may not be said of the present Associates. The Gila River has recently held elections and at that time two new Associates were elected. The previous Associate, Melvin Thompson, ran for the office of Chief Justice and unfortunately, lost. It is unfortunate because Judge Thompson was viewed as very competent in most matters brought before him. He was knowledgeable in the GRCC system and had much experience in the field of law enforcement, as did Judge Rhodes.

The present two judges are lacking in the qualities a court requires. It is unfortunate that the only experience they receive initially is on the job. I had opportunity to sit in on Judge Nelson Jose's court and found that he committed violations contrary to the mandate of the Indian Civil Rights Act. Judge Jose had been a trial court judge before, having last sat on the bench in the late nineteen-fifties. In his absence, Indian law and requirements of due process had changed dramatically. Yet Judge Jose probably viewed his role as though he was back in the nineteen-fifties and thereby denied many fundamental rights to the defendant who was before him. In this case the violations were of little concern because the fine which he doled out for a charge of DWI was not even close to the minimum as required by the law and order code. He gave the defendant a fine of $20 when the minimum fine allowable is $100. Thus, it is evident that the seminar which is given to tribal judges annually, did little to aid the judge during this period since it was given a few months after taking office. A solution to this type of problem would be for seminars to be given judges prior to taking the bench. Of course, this could result in great administrative problems, but the level of competence should not be derogated to a low level because of failure of a judge to read the law and order code and be unaware of the present state of the law.

Judge Ray Sundust is new to the court and also had problems when he first took the bench. The problems were similar to those of Judge Jose. I was only able to sit in on a few of the cases he heard because at the time of this observation, the docket was relatively short.

If a general problem does exist common to most tribal judges it is that they do not take advantage of the tribal advocates. This is especially true of the associate judges. The function of the advocates will be explained in more depth later. However, it is the inability of the tribal judges to use these officers of the court effectively so as to come to a verdict after hearing both sides of the argument. The role of judge is made more effective when he is able to objectively decide the issues based upon a showing of all the evidence and thereby come to a conclusion. Few judges appreciate having to decide issues of importance when fundamental rights may hang in the balance. Of course, it could be argued that almost everything may be important. However a defendant and for that matter, the tribe will be better represented if the maximum amount of use is made of these persons who are there to represent the tribe and the parties involved.

2. Tribal advocates

The GRCC has three tribal advocates and is represented by a tribal prosecutor in the person of Brady Whitman.

The function of the tribal advocate is to represent parties who may have a claim against another and to defend the party against whom such claim has been brought. The training which they receive is under the tutelage of the Legal Aid Attorney Rodney Lewin. He instructs them in procedures of filing, interviewing, and doing those things a lawyer would do in bringing a case in any court. They are also trained to represent the client in court by the use of advocacy skills which they are encouraged to acquire.

The tribal prosecutor is a rather new concept in the field of tribal law enforcement. The Chief Judge has stated that the reason for a prosecutor is that the tribe has not been able to sustain the burden of proof in those criminal cases requiring such burden of proof in those criminal cases requiring such burden. Essentially, the police act as prosecutor. The police have often appeared to be lax in their investigation, have not come prepared to court, have not appeared when they are due to testify, and generally, made a poor showing in court. Because of this, the tribe, at the urging of the Chief Judge, has hired a lay prosecutor whose job will be to insure that the tribe will be prepared to go forward in its burden. The duties of the prosecutor are analogous to those of a state prosecutor.

If a problem does exist between the role the advocates play and the tribal court judges it is that the advocates do not represent their clients to the full extent possible. This is not meant to be overly critical of their function in the tribal court setting, it is just an observation which may be the result of judges' inability to use the advocates' skills. It is a very difficult job the advocates must perform and easy to see why such an observation may be made. Consideration must also be given the fact that it is a legal aid program I am talking about and no monetary gain can be expected by the advocate.

The problem can be viewed more clearly if an example is given. I observed Judge Jose' court at a time when he was hearing a criminal matter. The prosecutor was present and was prepared to represent the tribe. The defendant was represented by an advocate. The judge proceeded to ask the defendant what he "had to say for himself," at which time the defendant offered little by way of testimony. At no time did the judge allow direct examination by the defendant's counsel nor cross examination by the tribal prosecutor. In fact he did not even advise the defendant of right against self incrimination or those various rights acknowledged to be fundamental to due process and fairness. He came to a decision upon his own much to the frustration of the tribal prosecutor.

With the foregoing observation it is evident that a tribal court can not operate effectively even though it may operate efficiently. The cases are heard and decided, although they may not accord the parties all the requirtments of fairness and due process. Where can the blame be placed? I believe that it must be shared by both. If the advocates can not be shown to represent their clients competently in the first instance, then it leaves the door open to the judges either to allow the advocates the full use of their skills or to stifle them and only allow their input at the discretion of the judge. On the other hand, the judges are doing themselves a disservice by not allowing the adjudicatory process to run its course. In the end the judge will have to decide these matters one way or the other. If the judge relies only upon his own experience and subjective reaction he will burden himself and have possible second thoughts about a decision which could have been greatly aided by the input of representation through competent counsel.

3. *Recorder and bailiff*

The court is aided by a bailiff whose duties are much like those of bailiff in state courts.

The recorder of the court also acts as tribal court secretary and has the duty of recording the transcript of court proceedings. The record of courtroom proceedings are taken on tape and are destroyed after a year. The time period is designated as reasonable to allow a party to appeal the decision of the court

It is appropriate at this time for a short discussion on the method allowed for appeal. A party who wants to appeal may appeal as a matter of right to an appellate court. Appeals are not frequently taken and I did not have an opportunity to hear one. The procedure is for review by a three judge court with the lower court judge absenting himself. I do not know how this would work in practice since GRCC has only three judges in total. I have been informed that a visiting judge is asked to sit as an appellate court judge. Judges from nearby reservations are asked to sit as appellate judges.

Thus the record is made in order that valuable court time will not be lost in a trial de novo and that the reviewing court may decide on the basis of the recording whether any violations occurred in the lower court.

4. Supportive personnel and organizations

As has been stated, the tribal court has received aid in the nature of training of the tribal advocates for courtroom practice. The legal aid attorney works closely with the Court and on occasion gives it advice on handling cases.

This cooperation is much to the benefit of the tribal court. However, the problem inherent in this activity is one of skepticism on the part of prospective clients of legal aid. It is not just the fact that legal aid works closely with the Court. Legal aid is situated only a matter of a few feet down the hallway from the judge's chambers. This proximity to the tribal court does not lend an air of full and open disclosure on the part of legal aid clients toward their tribal advocate council.

As a result of this feeling of "collusion" between the Court and legal aid, members of the tribe are not persuaded to use the legal aid services or the tribal court system.

The feeling by members of the tribe that they are not willing to use these services has been related to me on many occasions. Members would probably feel this way if legal aid did not openly cooperate with the Court or criticized its function in the tribal system of government. The real issue in the minds of tribal members may only be the proximity of legal aid to the Court. The fact that it is geographically located in the same building may give them reason to believe this. Therefore, it is reasonable to assume that if legal aid and the Court were not so closely connected, member's attitudes may change.

E. INTER-GOVERNMENTAL AGREEMENTS

A measure of the scope of authority and power of any court is the ability of its judgments to be given full force and effect in another jurisdiction.

Art. 4. of the U.S. Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." One of the functions of the clause is to assure that all states (and also the U.S. courts) will recognize the judicial decrees of the others, provided certain requirements are met. This requirement of granting "Full Faith and Credit" is lacking in international law where comity only is granted. Comity is defined to be the principle upon which courts of one jurisdiction may give effect to the laws and decisions of another.

Thus, there is no legal basis upon which any state court or, for that matter, another tribal court, is commanded to give "Full Faith and Credit" to the laws and decisions of a certain tribal court. The reason for this is that tribes are not states and, therefore, other courts are not constitutionally compelled to enforce their judgments.

The issue then becomes, "What basis must be formed before we arrive at a position whereby the laws and judgments of a tribal court may be given some kind of effect in another jurisdiction?" As has been discussed, there is no constitutional compulsion on another court to give effect to the judgment because the tribe is not a state. Similarly, the notion of "comity" as a principle of international law has no determinative effect. A court may either enforce or not enforce the judgment of a tribal court. Comity has no legal binding effect upon a court. Therefore, a medium must be reached whereby the jurisdictions involved agree to observe and give effect to the judgments of each other.

Intergovernmental agreements may be made so as not to deny one party's inherent sovereignty over certain matters within the scope of its authority. To enter into an agreement which would tend to erode governmental power over that governments affairs would amount to "governmental suicide."

With the foregoing as a starting point I will attempt to discuss the present situation at the Gila River Indian Community and the relationship which they have with the surrounding non-Indian community.

Gila River, it must be remembered, lies a few miles from the Phoenix Metropolitan area. It is surrounded by numerous communities. The reservation lies partly within Maricopa County and partly within Pinal County. The reservation stretches from South Phoenix to the West and then southward for approximately thirty miles along a federal highway to the East. Because of the vast area the reservation encompasses, the need for cooperation among the various local governments was necessary.

The Chief Justice and police officers, Sgt. Bob Rhodes, have on various occassions informed me of the agreements they were able to obtain with these local governments. Sgt. Rhodes' father was a tribal policeman in the early nineteen-fifties. He had jurisdiction over the entire reservation and his duty was to patrol the area. On many occasions he was asked by the Pinal County Sheriff to aid them in a search for a wanted suspect. This activity was reciprocated when Officer Rhodes required help. The informal agreement has resulted in mutual cooperation between local law enforcement agencies.

If an Indian has been charged with a crime and a warrant has been issued by a State court, all that is required is for the state police to bring the warrant to the tribal court, whereupon the tribal judge will issue a tribal warrant for the arrest of the named defendant. The tribal police shall attempt to find and arrest the defendant. If he is successfully arrested, he will later be turned over to the state police. The Chief Judge has stated, however, that he would first look into the nature of the warrant and see whether or not it was valid. (i.e., he would make an independent determination as to whether or not he felt there was sufficient certainty which would make it more probable that the named defendent was guilty or could be found guilty of the crime he is charged with.) I am assuming much by stating what the Chief Judge may or may not do so, since he has never informed me of what specific atcions he would take. His actions may depend totally upon the situation. However I feel that the actions which he might take, at the minimum, require a showing by the state authorities that the named Indian defendant is probably guilty of the crime as charged.

The preceeding is a description of informal extradition agreement between the tribe and local law enforcement agencies. This agreement has not reached the formal stage as has been the experience with the Navajo tribe which has extradition agreements with the states of Utah, New Mexico, Arizona and Nevada. Notwithstanding the fact that no formal extradition agreement exists, the degree of efficiency and effectiveness which exists between non-Indian and Indian communities is great. On many occasion, the tribe has been aided in their investigations by state law enforcement agencies. There have been few situations when the tribal police have required service of warrant to a defendant off of the reservation. In this respect, the tribe has not required the state and local law enforcement agencies to hold up their "end of the bargain."

Because the agreement is informal and therefore, "not in writing," it would appear tenuous. Perhaps, in some cases, state agencies may not want to assist the tribe in an investigation or deny them aid which up to that time had been given willingly by tribal law enforcement personnel. This action could take place but it is highly improbable.

In August of 1975, a meeting took place at the offices of the regional Solicitor General. Those present represented the tribe, the Department of the Interior, and state and couny government. Z. Simpson Cox, general counsel for the Gila River Tribe was present, as was Sheriff Paul Blubaum, for the County of Maricopa, and Bill LaVelle, for the Interior Department. The purpose of the meeting was to discuss, generally, the status of criminal jurisdiction over non-Indians. Sheriff Blubaum's opinion was that the tribe had jurisdiction over non-Indians who committed crimes on the reservation. His opinion would, therefore, appear to be the opinion of the Sheriff's Department for the County of Maricopa. He also stated that if the Gila River tribal police ever required assistance in any disturbance, the sheriff's department would come to their aid. This promise was unequivocal. In view of the above, it appears that although no formal agreement exists, the parties to the agreement are mutually agreed as to the terms of the agreement and have implemented them on many occasions. Such past performance results in a lasting effect. Therefore, if one of the parties chose to deny the existence of the agreement, the effect would be detrimental to their interests.

Denial of any agreements made by the tribe and local governments may result in damage politically and economically. Tribes are becoming more aware of their inherent ability to bargain politically. The basis for much of this power is the tribal land base. Local governments soon realize that it is far better to negotiate and form some degree of cooperation. An example of this is: The telephone company had to ask the tribal council for a right of way for their telephone lines in order to serve the communities south of the reservation. The council tabled this matter and put off the discussion. The reason for this was made evident. The telephone company charges long distance rates to members of the tribe whenever they call an exchange which is off the reservation. As a result, most of the calls made by tribal members are long distance. The council, therefore, tried to use this as a bargaining tool in order to receive more favorable rates for the tribe. I do not know what the outcome of the strategy was; however this is one small sample of how tribes can wield their power.

It seems obvious that in order for a tribe to be able to negotiate and reach some type of agreement between them and local non-Indian governments, they must be able to show an area of mutual agreement in which a problem exists and which is common to both parties. Furthermore, the tribe must show a willingness to cooperate (and so must the other party).

The tool to be used for bargaining purposes is the common need for security or economic development, or whatever the case may be. Through mutual cooperation the parties will be able to overcome their problems, with the least amount of discomfort to each. Just as obvious, the tribe should not end up giving many concessions to the other party in the process. I do not know how this could be avoided, but it is clear, that this approach should only be taken after long deliberation over those matters which the tribe feels it must achieve and those things which the tribe can not give up.

Incorporated within the informal agreement is the policy of cross-deputization. The Gila River police are cross-deputized so that they are qualified to arrest any person committing a crime on the reservation. Of course, the assertion of jurisdiction over non-Indians in criminal matters would appear to moot this requirement. However, since a portion of the reservation is located next to a major city, the need for cross-deputization is important. The tribal police have had to arrest persons after a chase, the arrest in many of these situations taking place off the reservation. The more common practice, however, is for state and local law enforcement officers to come onto the reservation in order to perform their duties. Most often involved in the encounters are those defendants who flee into the boundaries of the reservation, thinking they have eluded the police.

The agreements and practices described up to this point have emphasized the area of criminal law and have involved those activities germane to that area. A general discussion of the effect of these agreements in the civil area is in order along with a description of how they work in practice.

A large portion of this discussion is drawn from experience as a field representative for the American Indian Lawyer's Training Program and to an extent are repetitious of that study.

I have interviewed state court judges who have taken the view, generally, that they are of the belief tribal court decisions shall be granted "full faith and credit" based upon some notions of comity rather than on constitutional compulsion. The reason for this has already been stated. A state court will make an independent decision as to whether the party was accorded fundamental rights to due process; the subject matter jurisdiction of the court and personal jurisdiction of the court; and whether these requirements were met. If the state court found that the court had subject matter jurisdiction over the claim and personal matter jurisdiction over the parties and found that the party was not denied fundamental rights, a decision of the tribal court would be viewed as a court of competent jurisdiction and enforcement of its judgments required.

The same type of analysis can be made in the situation involving a state court judgment in a tribal court. It should be noted that the tribal court judge is under no compulsion to enforce the state judgment. The Chief Justice has informed me of this fact and said he may not enforce a judgment of a state court which did not prescribe to such an agreement.

It is apparent that enforcement of judgments in the civil court may not extend beyond county lines and is dependent upon the situation. The Gila River Court may give full effect to the judgments of a Pinal County court but may not give validity to a judgment of a state court in Coconino County. It also appears that the result would be the same and would not be dependent upon the nature of the claim or the cause of action.

APPENDIX XII

TRIBAL COURT REPORT

LOWER BRULE SIOUX TRIBE

Jerry Hill

FEBRUARY 17, 1976.

MEMORANDUM

To: Alan Parker
From: Jerry Hill
Re: Tribal Court Report, South Dakota Field Trip

INTRODUCTION

The Lower Brule Sioux Tribe is located in central South Dakota along the Missouri River. Crow Creek Sioux Reservation is on the opposite bank. The Lower Brule Reservation has a population of 820. There are about 75 non-Indians residing there. The land area is approximately 240,000 acres.

This report will focus on the tribal court system of the Lower Brule Sioux Reservation. In the discussion I will deal with jurisdiction issues, relations with the tribal council, the tribal judges as to qualifications, tenure, duties and compensation, administration of the court regarding case load, turnover of support personnel, docket, and record keeping.

Since this report will be used as a comparative study, it is important to note that whatever deficiencies may be perceived in the Lower Brule court system, they are largely the result of inadequate resources to implement refinements necessary to an improved system.

DISCUSSION

Jurisdiction

The tribal judges informed me that the court exercises jurisdiction over *all* Indians on the Lower Brule Reservation. Non-Indian offenders are turned over to local authorities for disposition. In the opinion of the judges, as well as the tribal Chairman and the police chief, jurisdiction should extend to *all* persons within the exterior boundaries of the reservation.

There exists the situation of one-way extradition on the reservation, i.e., the tribe will deliver up persons wanted by outside authorities on proper showings to one of the judges. It is apparent that this could work against the tribe; however, the judges were not impressed that this issue was particularly critical at this time.

As to whether there is jurisdiction over tribal council members for purposes of judicial review of administrative decisions, the issue has not yet arisen. It is likely that such jurisdiction exists, however. Elected officials of the tribe are *not* immune from prosecution on the tribal code and in fact have been tried when necessary.

The jurisdiction of all Indians on the reservation extends to federal employees working there. There have been no instances when federal employment was set up as a bar to tribal court jurisdiction, but it seems unlikely that it would be legally valid in any case.

Judges

The judges are elected for two-year terms. During non-election years they are appointed by the council and approved by the chairman to complete the remaining term. In fact, the chief judge has presided for 14 years and one of the associate judges for 10 years. The third judge is more recent.

The qualifications for judges are not stringent nor limited to Indians only. The basic requirements are: minimal age, no felony convictions, no misdemeanors involving moral turpitude, and high school graduate or equivalence.

It is significant that two of the three judges have been elected repeatedly showing that the community standards based on respect are probably as important, if not more so, than the objective criteria above.

The judges are compensated inadequately in proportion to their responsibilities. For example, as mentioned in the first report, there is no prosecutor and this function falls on the judge. This acts to compromise the independence of the judges; yet they continue with this handicap which would be intolerable in a white man's court. One of the judges is also the probation officer and there again must at times be in conflict.

In addition, the judges must assist one another when the clerk is absent or employed elsewhere. This will be discussed under administration below.

The chief judge and one of the associate judges are compensated under a Bureau of Indian Affairs contract while the other associate judge is paid as the probation officer through L.E.A.A.

In my opinion, the judges are handicapped by the compensation arrangements which should be designed to enhance their independence.

Administration

This area is largely, and in my opinion unfairly, an additional responsibility of the judges. Due to lack of resources there is a turnover problem with the court clerk. When the clerk is absent the judges must assume that responsibility in addition to the duties outlined above. The clerk is paid through a Bureau of Indian Affairs contract.

It seems that the court system would be greatly improved if (1) there was a full-time prosecutor, and (2) each judge had the assistance of a clerk (in the traditional legal sense) for research purposes. Each judge keeps her own docket, which would normally be part of the clerk's duties.

It was not possible to qualify the actual case load. However, the three judges are busy on a full-time basis. The case load is one-fourth or less civil, those being chiefly domestic cases and occasional probate cases. The majority are criminal cases, and the majority of those are alcohol related incidents.

Record keeping is an area that the judges feel is in need of improvement, and in view of the clerk problem and lack of resources, such attitude is not surprising.

Fines are collected by the court clerk and turned over to the tribal clerks. Whether or not they are used to defray operational expenses of the court, I was unable to determine.

Miscellaneous

The relationship with the tribal council appears to be good. The tripartite system is in force in Lower Brule, and it seems that there is an actual separation of powers that is respected as such. The relations with the reservation police are also respectful.

CONCLUSION

The court system in Lower Brule is handicapped by a number of factors which can be directly traced to inadequate resources. For example, the lack of a prosecutor not only inhibits a fully functioning system, but compromises independent judicial functions. The added work for the judges obviously detracts from an efficiently functioning system. The clerk problem compounds record keeping and forces on the judges additional work.

The problems and impediments above can be directly linked to inadequate resources. Additional resources could work to the almost immediate improvement of the court system by allowing the judges to concentrate on their judicial functions and oversee the court's administration rather than be tied to the multiple duties which fragment their effiicency. Record keeping would improve significantly.

Finally, I believe this report shows the responsibility of the federal government to support in money resources a fully functional tribal court system. This is also borne out by the fact that where such resources exist, such as Gila River, Arizona, the efficiency is reflected in the court system, i.e., differences in resources results in corresponding differences in the adequacy of the system.

MEMORANDUM

To: Alan Parker
From: Jerry Hill
Re: Tribal Court Report, South Dakota Field Trip

INTRODUCTION

This report is written in a narrative form which will be refined to your requirements. As I was somewhat uncertain as to exactly what information to focus my attention on, I proceeded on the basis of my best judgment.

Primarily, I had planned to visit three reservations in South Dakota on January 6, 7, 8, 1976. However, due to inclement weather conditions I was only able to go to Lower Brule.

While at Lower Brule I met with the Tribal Chairman, Mike Jandreau, two Tribal Judges, and the Reservation Police Chief. In addition, I spoke with several non-Indian attorneys working for South Dakota Indian Legal Services (S.D.I.L.S.).

The visit was very worthwhile both in terms of information and the hospitality with which I was received.

TRAVEL

I left Sacramento at 12:00 noon on January 5, 1976. I arrived at South Dakota at 6:45 p.m. that evening. The plan was to leave Vermillion in the morning to be at Lower Brule on Tuesday, January 6, at Crow Creek on Wednesday, January 7, and finally at Cheyenne River on Thursday, January 8. On Tuesday, January 6, there was a ground blizzard which closed the roads between Vermillion and Lower Brule so I stayed, trying to make arrangements for the next two days.

I left Vermillion early on Wednesday, January 7, for Lower Brule, but the extreme cold (—15° F.) caused the freezing of my gas line which resulted in reduced speed, i.e., it took all day to reach Lower Brule.

Thursday, January 8, was the only day I had to do what I came for so I spent it there at Lower Brule. I scheduled my return from Pierre, South Dakota at 9:30 a.m. on Friday, January 9.

I left Lower Brule at 7:00 a.m. on January 9, but due to the same car trouble previously mentioned, I didn't arrive until 10:30 a.m. and left at 12:30 p.m. Because the airport at Sacramento announced that it was not receiving planes, the plane had to land at Oakland and we were bussed back to Sacramento. Finally, I arrived home at 1:30 a.m. Saturday, January 10, 1976.

The travel was really exhausting both from the time spent and the weather which I encountered; but I'm confident that the results were worth it.

DISCUSSION

Chairman

My discussion with the Chairman was very cordial. He is obviously a busy person but managed to spend several hours with me discussing a wide variety of subjects. Most of the time was spent in talking about the tribal government, the tribal court, and law enforcement on the reservation.

It is my opinion that the Chairman is very aware of the limitations on the tribal government and on the tribal court in particular. I was accompanied by a local Indian law student who will graduate this year and whose presence generated questions pertaining to legal representation of the tribes in South Dakota in general.

The Chairman described the need of most, if not all, South Dakota tribes for legal counsel. Although the Lower Brule tribe has an attorney on retainer, he felt that an in-house counsel would be more amenable to the needs of the tribe. However, the tribe is unable to have such full-time counsel because (1) attorneys for such positions are unavailable, i.e., Indian law graduates and non-Indians do not want to work on the reservation, and (2) the tribe cannot pay a full-time attorney.

It seems to me that there are several reasons for Indian and non-Indian lawyers' reluctances to work on a reservation. For the non-Indian lawyers the reservation lifestyle is at such variance with their backgrounds that they feel isolated. Social life and opportunities are severely limited for these persons and the result is discouragement, and they finally leave. I was able to perceive this attitude while speaking to the non-Indian attorneys with S.D.I.L.S. As to Indian lawyers, there are several in South Dakota at this time and here the demand exceeds the supply. It appears that even familiarity with reservation lifestyle does not preclude the same discouragement described above. It may even increase the sense of frustration.

In my opinion, the demands on an attorney on the reservation, whether Indian or non-Indian, are severe from a working-conditions point of view and a social point of view, particularly for a single person. For the single parent Indian attorney the demands are even greater. This discussion omits the pervasive problems of tribal politices which would create additional pressure for a tribal attorney, especially if such attorney is young and/or inexperienced.

In asking for full-time counsel, the tribe is asking a lot and facing one of the horns of a seemingly insolvable dilemma. The other horn is the lack of funds to pay a full-time attorney, *if* he is available.

The lack of money was cited by the Chairman in this regard, but it was also cited by the Tribal Judges and the Chief of Police as I will describe later. It seems that the financial inability to hire full-time counsel works to an extreme disadvantage for the tribe as a government. I have arrived at this conclusion because since the tribe must deal with other governmental organs (local and federal) who do have access to immediate counsel, the tribe must either delay actions or act without advice. In the abstract this is inequality of resources and on a practical level works an unfair hardship on the tribal government.

Tribal judges

I spoke at length with the two Associate Tribal Judges. The Chief Judge was unavailable because she was in the hospital.

They seemed somewhat stern and suspicious of me but gradually became more hospitable and spoke freely. I was careful to stay away from confidential areas, i.e., who did what when, etc., and I think they appreciated my discretion.

Neither had prior legal training but learned from presiding. Recently they have been able to attend Tribal Judges training seminars to upgrade their legal skills. The Chief Judge is also without formal legal training, but I sensed a great respect for her, as I did for both judges with whom I spoke.

Both judges agreed that it would be better if at least the Chief Judge were a trained attorney. This was not in criticism of the Chief Judge, but recognition of the legal demands on the Tribal Court system.

Jurisdiction on the Lower Brule reservation is over Indians exclusively; non-Indian offenders are turned over to local authorties for disposition. The judges indicated that all persons on the reservation should be under the jurisdiction of the Tribal Court.

Non-Indian attorneys, usually with S.D.I.L.S., do appear and are generally respectful, at least in the court. I did sense a somewhat cynical paternalistic attitude when speaking to the non-Indian attorneys at S.D.I.L.S., but in court proper respect prevails. In any case, the judges have, and assert when necessary, contempt powers, even against non-Indian attorneys.

The judges sign extradition orders but indicated that the non-reciprocity with the local agencies is illogical and unfair. The Police Chief's attitude accorded this non-reciprocity to be of lesser importance than other things which I'll discuss later. The general relationship with the reservation police is respectful.

Record keeping is minimal. At one time most depositions were taped on a cassette and then transcribed; but due to a turnover in court personnel (i.e., clerks), no records are kept. On this point the judges expressed some frustration and explained how they had been forced to do the duties of the clerk in addition to their judicial functions.

This raises an area of urgency, in my opinion: the judges must function in multiple capacities which is exhausting, confusing and sometimes in conflict. The judges know this but do what they can in a less-than-favorable situation. E.g., one of the judges is also the probation officer; at times she is in the position of making recommendations to herself. The woman is fair and honest, but the demand on her independence is obvious.

In this area, by far the *most vulnerable situation* is that there is no prosecutor so that the judges must assume that duty also. The judges deplored this situation and have actively been seeking a method of funding to hire a full-time prosecutor but have been stymied in all attempts.

If the tribal government is limited by the lack of funds to hire a full-time attorney, the Tribal Court suffers immeasurably more for the lack of funds to hire a full-time prosecutor, a seemingly indispensable element in the type of judicial system that exists at Lower Brule and probably other reservations. The danger here is that it opens the Tribal Courts to challenge by anyone convicted. The fact that it has not happened yet only highlights the danger.

The facilities of the Court were small but adequate. The judges described them as poorly designed but didn't give the matter a high priority in their needs. Prior to this building, Tribal Court was held in one room of a two-bedroom home while another room was used for the Police Department. The facilities which they showed me are sufficient to provide space for a prosecutor with minimal alterations required.

I did not determine their law and order code but assumed it was a tribal code.

I had no reason to doubt the competency or fairness of the judges. In fact, I was amazed that they carried on so admirably under conditions which would surely discourage their non-Indian counterparts who take their situations for granted.

It seems that minimally the federal government should provide the *funds* to hire a full-time prosecutor for several reasons: (1) to preserve the integrity of the Tribal Court in protecting the judgments from the attack to which they are so vulnerable, and (2) to allow the judges to devote their full time to their judicial duties.

Police Chief

The Chief of Police is an Indian from another state who is a career B.I.A. police officer. His force consists of eight men, the majority of whom are B.I.A. policemen; but there are several tribal policemen in his force. There is obviously good rapport between the police and the Council as well as the courts.

I was informed that *lack of funds* worked to the detriment of enforcement in that improved facilities would *have* to be available in the future. However, in consideration of the fact that the Police Department at one time had been in a room in a house, it seemed to me that the facilities were quite adequate. I have to admit to ignorance as to what constitutes minimal requisites for law enforcement, however.

More significantly, the Police Chief was also critical of the fact that the judges were also forced to prosecute. I asked whether the arresting officer should perform that function and his reply was that the arresting officer would be biased, i.e., in conflict, too, and no improvement would be made on the existing system.

He felt that the fact that he was not from there was an advantage because he had no tribal obligations or alliances to protect. I tended to agree with this point although it is at variance with theoretical concepts of tribal sovereignty.

CONCLUSION

The prevailing concerns of the tribe with regard to legal needs can be summarized as follows: (1) there is a need for a full-time in-house counsel; there are few Indian or non-Indian attorneys available for such positions; and there is *no money to pay them;* and (2) there is an *urgent need* for a full-time prosecutor, adequately trained support personnel (clerks) for recording purposes and for assisting the judges.

I have narrated this experience, as I said before, so that you might suggest how I might focus on one part or another to get the information you are after.

Since I told the Chairman I would send him copies of everything I might write concerning the visit, I will send him a copy of this memorandum for his information, and to review for accuracy.

I'll call next week after I'm sure you have received this report.

Thank you for everything.

APPENDIX XIII

INDIAN TRIBES AND FULL FAITH AND CREDIT

In *Jim* v. *CIT Financial Service Corp.*,[1] the New Mexico Supreme Court held that the Navajo Nation, for purposes of 28 U.S.C. § 1738 (1970),[2] which is the enabling statute for the full faith and credit clause of the United States Constitution,[3] was a territory. This holding, if correct, could have consequences that might dramatically change, particularly on the commercial level, the relationship between Indian tribes and individual states.

Appellant, Alan Jim, an enrolled member of the Navajo Nation, purchased a pickup truck in Farmington, New Mexico. Appellee, CIT Financial Services Corp., a national corporation, financed the purchase of the truck. Appellant, living on the reservation and keeping the truck there, failed to make payments on the truck as required by the contract. Then Appellee, without filing either a replevin or any other form of action in the Navajo Tribal Court or in the New Mexico state courts, sent two agents to the Navajo reservation to repossess the pickup.

Jim then filed, in the New Mexico District Court for San Juan County, an action for damages based on sections 307[4] and 309[5] of the Navajo Tribal Code. Section 307 of the Tribal Code provided that written consent from the party affected or an order from the tribal court is required in order to repossess personal property of Navajo Indians. Section 309 provided a remedy for those whose rights had been violated under section 307: the purchasee may recover "an amount not less than the credit service charge plus ten percent (10%) of the principal amount of the debt or the time differential plus ten percent (10%) of the cash price." Jim made no claim under New Mexico law; he based his action solely on the provisions in the Navajo Tribal Code.

The District Court[6] dismissed the action for failure to state a claim upon which relief could be granted, presumably because New Mexico courts could not hear a claim based upon Navajo law or alternatively because CIT had the

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[1] 87 N.M. 362, 553 P. 2d 751 (1975).

[2] The text of the statute is as follows:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be provided or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a cerificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[3] U.S. Const. Art. IV, § 1.

[4] 7 Navajo Tribal Code § 307 (1969) states:

Repossession of personal property. The personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of reposession except in strict compliance with the following:

(a) Written consent to remove the property from land subject to the jurisdiction of the Navajo Tribe shall be secured from the purchaser at the time repossession is sought. The written consent shall be retained by the creditor and exhibited to the Navajo Tribe upon proper demand.

(b) Where the Navajo refuses to sign said written consent to permit removal of the property from land subject to the jurisdiction of the Navajo Tribe the property shall be removed only by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding.

[5] 7 Navajo Tribal Code § 309 (1969) states:

Civil liability. Any person who violates section 307 of this title and any business whose employee violates such section is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused by the failure to comply with sections 307–309 of this title.

If the personal property repossessed is consumer goods (to wit: goods used or bought for use primarily for personal, family or household purposes), the purchaser has the right to recover in any event an amount not less * * *.

[6] 87 N.M. 362, 363; 533 P. 2d 751, 752 (1975).

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right to peaceable self-help repossession under the provisions of the Uniform Commercial Code,[7] which New Mexico had adopted.[8]

On appeal, the majority of the Court of Appeals affirmed the District Court's action,[9] even though the panel was unable to agree on a single basis for affirming the lower court holding. Notwithstanding, both those concurring the dissenting did agree that the crucial issue was whether or not the Navajo Nation was a "territory" within the meaning of 28 U.S.C. § 1738 (1970).[10]

The New Mexico Supreme Court reversed the Appeals Court decision by holding that 28 U.S.C. § 1738 (1970) was applicable and that the Navajo Nation was a territory for the purposes of full faith and credit.[11] The Court reached this conclusion in a rather cursory manner simply by citing *Mackey* v. *Coxe* [12] and *Americana of Puerto Rico, Inc.* v. *Kaplus* [13] and by agreeing with the initial reasoning of Judge Hernandez of the Court of Appeals.[14]

The brevity of the New Mexico Supreme Court's opinion should not obscure the importance of the case, particularly in an era when contemporary Indian policy is in a state of flux. The new watchword of federal policy is "self-determination." [15] New legislation,[16] policy studies, and case law that strongly reaffirm the right of tribes to be relatively free from state control and interference are evidence of this change in federal Indian policy. Consequently, the New Mexico Supreme Court's decision, one rendered in a state with a large Indian population, is particularly important because it recognizes tribal law as a legitimate alternative in choice of law considerations and because it institutionalizes the relationship between tribe and state. Jim institutionalizes the tribe-state relationship by extending the operation of the Full Faith and Credit Clause,[17] along with its enabling legislation,[18] to tribe and state.

I. THE HISTORICAL BACKGROUND OF THE FULL FAITH AND CREDIT CLAUSE

Information on the historical background of the Full Faith and Credit Clause [19] is scanty.[20] And although commentators agree that the original intent of the clause was not well thought out,[21] the clause was considered necessary to promote the as yet undefined relationship between the states.

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[7] N.M. Stat. Ann. § 50A-9-504 (1953).

[8] New Mexico adopted the Uniform Commercial Code in 1962.

[9] 86 N.M. 784, 527 P. 2d 1222 (Ct. App. 1974).

[10] Id. at 787 and 789, 522 P. 2d at 1225 and 1227.

[11] 87 N.M. 362, 363, 533 P. 2d 751, 752 (1975).

[12] 59 U.S. (18 How.) 100 (1955).

[13] 368 F. 2d 431 (3rd Cir. 1966).

[14] Judge Hendley in his opinion for the Court believed that *McClanahan v. State Tax Commission of Arizona*, 411 US 164 (1973), was dispositive of the issue. In *McClanahan*, Justice Marshall, writing for a unanimous court, held that Arizona could not impose a personal income tax on income derived from reservation source by a Navajo resident living on the reservation. In reaching this conclusion, Marshall noted that Indian tribes are separate entities from the state in which they are contained. To emphasize this issue he quoted *U.S.* v. *Kagama*, 118 U.S. 375, 381–382 (1886): "* * * But it is nonetheless still true, as it was in the last century, that [t]he relation of the Indian tribes living within the borders of the United States [is] an anomalous one and of a complex character. * * * They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the the full attributes of sovereignty, but as separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside. *United States* v. *Kagama*, 118 U.S. 375, 381–382 (1886). Judge Hendley interpreted Marshall's use of *Kagama* in *McClanahan* that Indian Tribes are "semi-independent" nations as evidence that they are not territories, at least for purposes of 28 USC § 1738 (1970). Judge Hendley's position is that, because the court in *McClanahan* did not specifically denominate the Navajo Nation as a territory, it could not be a territory. He reasoned further that an earlier case, *Mackey* v. *Coxe* 59 U.S. (18 How.) 100 (1855), did not control because the court held that the Cherokee Nation was a territory for only certain purposes, VIZ., that its laws authorizing letters, testamentary and of administration should be given full faith and credit in the District of Columbia. Instead, Judge Hendley found support for his interpretation of 28 USC § 1738 (1970) in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973), where the court held that the District of Columbia was not a territory for purposes of a civil rights suit under 42 USC § 1983 (1970).

[15] McDermott, The Indian Law Program at the University of Montana, 33 Mont. L. Rev. 187, 188 (1972).

[16] See Indian Self-Determination and Education Act, 5 U.S.C.A. § 3371 (Supp. 1976); 25 U.S.C.A. §§ 13a, 450–450m, 455–458e (Supp. 1976); 42 U.S.C.A. §§ 2004b, 4762 (Supp. 1976); 50 U.S.C.A. § 456 (Supp. 1976).

[17] U.S. Const. Art. IV, § 1.

[18] 28 U.S.C. § 1738 (1970).

[19] The history of the Full Faith & Credit clause is discussed in Cook, The Powers of Congress Under the Full Faith & Credit Clause, 28 Yale L.J. 421 (1919); Nadelmann, Full Faith & Credit to Judgments and Public Acts: A Historical—Analytical Reappraisal, 56 Mich L.Rev. 33 (1957), and E. Corwin, The Constitution and What It Means Today 199–208 (13th ed. 1973).

[20] Cook, supra note 21, at 422–426 & Nadelmann, supra note 21, at 53–59.

The available information indicates that Congress wasted little time in exercising its powers under the Clause. In 1790, during the second session of the first Congress, a committee was appointed to draft legislation under the Full Faith and Credit Clause. Subsequently, Congress passed an act[22] to provide for the recognition of judgment proceeding under the Clause. The current statute[23] has changed little from the one the first Congress enacted. Commentators on the history of the enabling legislation have referred to subsequent changes prior to 1948 as being only technical changes.[24] One of those technical changes raises the issue of the scope of the word "territory." [25]

In 1804 Congress enacted legislation[26] amending the 1790 Act; [27] the 1804 Act prescribed the manner of proof necessary, described the effect of records on various courts, and extended the scope of the enabling legislation to the territories. The extension of the Full Faith and Credit Clause to the territories was necessary for accomplishing integration of the newly conquered lands of the West into the Federal system. The legislative history on the territorial amendment does not mention Indian tribes.

That there is no mention of Indian tribes is not surprising primarily because federal policy toward Indians was one of political separation; [28] Indian tribes were considered semi-independent nations,[29] Chief Justice Marshall had not yet denominated them as "domestic dependent nations," [30] and given this federal-tribe relationship it would have been inconceivable to consider them part of the republic.

II. CASE LAW DEFINING "TERRITORY" AS IT APPLIES TO FULL FAITH AND CREDIT QUESTIONS

The only interpretations of the meaning of "territory" for purposes of the 1790 statute[31] and its successor,[32] until *Jim* v. *CIT*,[33] involve the status of the District of Columbia. Since the Full Faith and Credit Clause only speaks of recognition between states, the inclusion of territories raised questions of Congress' power to legislate beyond interstate relationships. The issues raised in earlier cases involving the District of Columbia[34] centered around whether the legislation enacted in the predecessors of 28 U.S.C. § 1738 (1970) was dependent wholly on Art. IV[35] or whether the power to enact legislation broader than Art. IV was derived from the general judiciary power of the United States.

In *Emory* v. *Palmer*,[36] the Supreme Court held that the powers to prescribe the effects of judgments were within the general judicial power of the United States and that the Acts of 1790[37] and 1804[38] were derived from that power and therefore binding on the States.[39] Consequently, Congress' power to prescribe the effects of judicial proceedings and records was constitutionally permissible. The general judicial powers in Art. III[40] were broad enough to encompass the power to determine interstate relationships. The Court found that for purposes of the statute the District of Columbia was indeed a territory, even though it did not meet the common definition of territory, i.e. an "inchoate state."

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[21] Cook, supra note 21, at 435.

[22] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[23] 28 U.S.C. 1738 (1970).

[24] Nadelmann, supra note 21, at 81–82 & A. Von Mehren and D. Trautman, The Law of Multistate Problems 1228 (1965).

[25] Compare 28 U.S.C. § 687 (1940) with 28 U.S.C. 1738 (1970).

[26] Act of March 27, 1804, ch. 56, 2 Stat. 298.

[27] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[28] See Treaty of September 17, 1778, 7 Stat. 13. The language of this treaty indicates that the colonial government viewed the Delaware Tribe as a separate "Nation" with distinct "boundaries."

[29] See Treaty of Jan. 21, 1785, 7 Stat. 16. That document provides that "The said Indians do acknowledge themselves and all their tribes to be under the protection of the United States and of no other sovereign whatsoever." This military subordination indicated that tribal autonomy had certain political limitations.

[30] See *Worchester v. Georgia*, 31 U.S. (6 Pet) 515 (1852).

[31] Act om May 26, 1790, ch. 11, 1 Stat. 122.

[32] Act of March 27, 1804, ch. 56, 2 Stat. 298 & 28 U.S.C. 1738 (1970).

[33] 87 N.M. 362, 533 P.2d 751 (1975).

[34] *Embry v. Palmer*, 107 U.S. 3 (1882).

[35] U.S. Const. art. IV, § 1.

[36] 107 U.S. 3 (1882).

[37] Act of May 26, 1790, ch. 11, 1 Stat. 122.

[38] Act of March 27, 1804, ch. 56, 2 Stat. 298.

[39] 107 U.S. 3, 9–10 (1882).

[40] U.S. Const. art. III, § 1.

Emory is an important case for two reasons. First, it would serve as a precedent authorizing Congressional legislation aimed at extending the operation of the Full Faith and Credit Clause to tribe and state. Second, *Emory* clearly illustrates that "territory" is not a fixed concept and that one must interpret the meaning of "territory" in the light of the statutory context.

In *District of Columbia* v. *Carter* another case involving nearly the same question as *Emory*, the Supreme Court determined that the District of Columbia was not a territory [41] for purposes of 42 U.S.C. § 1983,[42] which is the statute authorizing civil actions against any State or Territory for the deprivation of rights guaranteed by the Constitution and laws of the United States. Curiously enough the New Mexico Court of Appeals placed great reliance on the "inchoate state" definition of territory given in *Carter*.[43] Although *Emory* and *Carter* might seem contradictory at first, when read together they demonstrate that determining the territorial status of a political entity depends on the purpose and intent of the statute. Thus, in *Emory*, the Court determined that it was not necessary for the legislative history or the statute to specifically mention the District of Columbia in order for the Court to find that it is a territory for purposes of 28 U.S.C. § 1738.[44]

III. INDIAN TRIBES AS TERRITORIES

Prior to the New Mexico Supreme Court's decision,[45] no court had examined the status of Indian tribes under the Full Faith and Credit statute, even though the status of tribes for other full faith and credit actions had been litigated numerous times. The leading case in holding that judgments and public records from tribal courts are entitled to full faith and credit in *Mackey et al* v. *Coxe*.[46] Although *Mackey* involved the provision of the enabling legislation of 1812,[47] which required recognition of administrators appointed from the territories, rather than the Acts of 1790 [48] or 1804,[49] the Supreme Court reasoned that Cherokee Nation's letter of appointment for testamentary purposes were entitled to full faith and credit. The Court reasoned that, at least for the purposes of the 1812 Act, Indian Nations were territories.[50]

The concept of territory for inchoate states should be the same for tribes because the policy of providing some sort of cohesion underlying full faith and credit should also include tribes since tribes exercise powers similar to states and territories. Likewise, the same objective that mandates mutual recognition between states, viz., the preservation of the Union, should also apply to the state-tribe relationship. *Mackey*, therefore, is important because it describes the reasons for having full faith and credit between tribes and other governmental entities. The Court stated:

"And be it further enacted, that it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in any of the United States or the territories thereof [emphasis added], to maintain any suit or action and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said district; and the letters testamentary or of administration, or a copy thereof, certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, hath or have administration.

"In some respects they [tribes] bear the same relationship to the federal government as a territory did in its second grade of government under the Ordinance of 1787.

"Such territory passed its own laws, subject to the approval of Congress; and its inhabitants were subject to the Constitution and acts of Congress. The principal difference consists in the fact that the Cherokees enact their own laws, under the restriction stated, appoint their own officers, and pay their own expenses. This, however, is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic, territory—a territory which originated under our Constitution and laws."[51]

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[41] 409 U.S. 418 (1972).
[42] Id. at 419.
[43] *Jim* v. *CIT Financiel Corporation*, 86 N.M. 784, 787, 527 P2d 1222, 1225 (1974).
[44] 409 U.S. 418, 431–432 (1972).
[45] *Jim* v. *CIT Financial Services Corporation*, 87 N.M. 362, 533 P2d 751 (1975).
[46] 59 U.S. (18 How.) 100 (1855).
[47] Act of June 29, 1812, ch. 106, § 11, 2 Stat. 758.
[48] Act of May 6, 1790, ch. 11, 1 Stat. 122.
[49] Act of March 27, 1809, ch. 56, 2 Stat. 298.
[50] 59 U.S. (10 How.) 100, 103 (1855).

The Eighth Circuit Court of Appeals, in the late nineteenth century,[52] adopted the same position in a number of cases involving ejectment,[53] wrongful detainer,[54] the dismissal of an injunction,[55] quarantine regulation,[56] divorce,[57] use tax,[58] and probate proceedings.[59] The importance of these cases lay not in their value as precedents but in the fact that they recognized proceedings of tribal courts to be entitled to full faith and credit just as if the proceedings involved territorial courts. In these cases, tribes were viewed as distinct political entities capable of managing their own affairs and therefore entitled to recognition of judgments and public records.

IV. CASE LAW AND LEGISLATION ON EXTENDING FULL FAITH AND CREDIT TO INDIAN TRIBES

Interestingly enough, the subsequent amendments and recodifications of the full faith and credit statutes did not mention Indian tribes.[60] Even if this silence cannot be taken as Congressional acquiescence of earlier judicial decision on the subject, it is enough to note that these decisions have never been legislatively overruled.

With the exception of *Mackey*, none of the cases holding that full faith and credit applies to tribes discuss any relevant full faith and credit legislation enacted under either Art. III or Art. IV.[61] Consequently, the relationship between the cases and full faith and credit legislation, particularly 28 U.S.C. § 1738, is tenuous at best.

In 1948 Congress passed a general code revision;[62] the Act of 1804 became 28 U.S.C. § 1738 (1970). Between 1804 and 1948 no changes were made in the statute as to territory. The purpose of the general code revision, as it related to federal courts, was to solidify the various provisions that had been adopted since 1911 and scattered throughout the United States statutes.[63] Because the purpose of the provision was to solidify the various provisions, changes were intended to involve language and not substance.[64] Congress' silent recodification of 28 U.S.C. § 1738 would indicate perhaps a tacit acceptance of the existing statutory law and case law or full faith and credit as it related to Indians.

The leading language supporting the proposition that tribes are not entitled to full faith and credit is found in *Regay* v. *Miller*,[65] an Arizona Supreme Court case. Petitioner Begay filed a habeas corpus petition against Miller, sheriff of Apache County in Arizona, to secure release from jail after having been found guilty of contempt by an Arizona court for failure to pay alimony pursuant to an Arizona divorce decree. Begay and his wife had obtained a divorce from the Navajo tribal court, which had awarded alimony that had led to the contempt conviction. The Arizona Supreme Court held that the Navajo decree must be recognized; therefore, the Arizona divorce was invalid. The Court reasoned that if both parties had been properly before the tribal court then Arizona would recognize the divorce "because of the general rule, call it by whatever name you will, that a divorce valid by the law where it was granted is valid anywhere."[66] The Court, in reaching this conclusion argued that tribes were not constitutionally entitled to full faith and credit because Art. IV[67] referred only to states. The Court ignored 28 U.S.C. § 1738 and the line of cases holding that tribes were entitled to full faith and credit.[68] The Court also said that comity was not applicable because it "presupposes two independent sovereigns."[69]

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[51] Id.

[52] The creation of the Tenth Circuit in 1929 made most of these cases. Tenth Circuit precedents rather than Eighth Circuit ones, since the cases arose in states presently within the Tenth Circuit jurisdiction. See Act of Feb. 28, 1929, ch. 363, § 116, 45 Stat. 1346.

[53] *Mehlin* v. *Ice*, 56 F. 12 (8th Cir. 1893).

[54] *Exendine* v. *Pore*, 56 F. 777 (8th Cir. 1893).

[55] *Standley* v. *Roberts*, 59 F. 836 (8th Cir. 1894), app. dismissed 17 S.Ct. 999 (1896).

[56] *Cornells* v. *Shannon*, 63 F. 305 (8th Cir. 1894).

[57] *Raymond* v. *Raymond*, 83 F. 721 (8th Cir. 1897).

[58] *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905).

[59] *Hayes* v. *Barringer*, 168 F. 221 (8th Cir. 1909).

[60] See Barron, "The Judicial Code 1948 Revision," 8 F.R.O. 439 & Hearings Before Subcommittee No. 1 of the House Judiciary Committee on H.R. 1600 and H.R. 2085, 80th Cong., 1st sess., March 7, 1947.

[61] U.S. Const. Art. III, § 1 and Art. IV, § 1.

[62] Act of June 25, 1944, ch. 646, 62 Stat. 947.

[63] C. Wright, Federal Courts 13 (2d ed. 1970).

[64] "The chairman of the Committee on Revision stated that the policy of the revision was avoidance wherever possible and whenever possible of the adoption in the revision of what may be described as controversial substantive changes of the law. In the opinion of the chairman that policy had been very carefully adhered to." Nadelmann, supra note 21, at 82.

[65] 70 Ariz. 380, 222 P2d 624 (1950).

Arizona has since partially retreated from the *Begay* language. In *In re Lynch's Estate,*[70] the Arizona Supreme Court held that a Navajo will, having already been admitted to probate in a tribal court, should be accorded the same force and effect as a will probated originally in an Arizona state court. The Court's reasoning is worth noting since it essentially supports the independence of government arguments in *Mackey.*

Section 14–343 * * * provides that the will shall be admittted to probate in another state or foreign country. The Navajo Indian Tribe is not strictly speaking "another state or foreign country," but there can be no question that its courts have a separate jurisdiction from the Arizona courts. *Williams* v. *Lee,* 83 Ariz. 241, 319 P.2d 998 (1958), is in point. The United States Supreme Court speaking generally of the treaty between the Navajo Nation and the United States Government, stated:

"Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worchester* v. *Georgia,* was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. Since then, Congress and the Bureau of Indian Affairs have assisted in strengthening the Navajo tribal government and its courts."

We are therefore of the opinion that the proceedings held in the Navajo Tribal Court must be treated the same as proceedings in a court of another state or foreign country. * * *[71]

Arizona is backpedaling from its position in *Begay* to a position of at least comity, which was based primarily on the decision in *Williams* v. *Lee,*[72] and reflects the underlying policy that a tribe's laws should be accorded full faith and credit.[73]

It is the uniformity of reasoning in the above cases that is important. There is no longer an issue concerning the legitimacy of India tribal goverment, the validity of Idian courts, or the passage of the Indian Civil Rights Act of 1968. Many of the Anglo-preconceived weaknesses of these courts have been corrected.

V. STATUTORY INTERPRETATION OF 28 U.S.C. SEC. 1738

Perhaps the closest analog to 28 U.S.C. § 1738 for statutory construction purposes in the legislation implementing interstate extradition.[74] In *Arizona ex rel. Merrill* v. *Turtle,*[75] the Court held that the State of Arizona had no power to extradite an Indian from the Navajo Reservation pursuant to the constitutional mandate of extradition demands by Oklahoma. The Court based its reasoning on the Navajo Treaty of 1868[76] and the general principle of Indian law that those rights not specifically taken from the tribe still remain with the tribe.

The *Turtle* case is important for full faith and credit analysis under the statute because Congress enacted legislation[77] that implement the Extradition Clause of the Constitution just as it did for the Full Faith and Credit Clause.[78] Although the major purpose of the extradition statute was to provide a uniform procedure for accomplishing interstate extradition, the statute also provided the power to extradite, vesting this power in both states and territories.

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[66] Id. at 384, 222 P.2d at 628, citing *Alton* v. *Alton,* 207 F.2d 667 (3rd Cir. 1953), appeal dismissed as moot, 347 U.S. 610 (1954).

[67] U.S. Const. Art. IV, § 1.

[68] Supra notes 49, 56–62.

[69] 70 Ariz. 380, 384, 222 P.2d 624, 628 (1950). Since a court can recognize other courts' laws and judgments only through comity or full faith and credit, it is difficult to understand exactly what the court thought it was doing in recognizing the divorce while explicitly denying full faith and credit and comity.

[70] 92 Ariz. 354, 377 P.2d 199 (1962).

[71] Id. at 357, 377 P.2d at 201.

[72] 358 U.S. 217 (1959).

[73] 25 U.S.C. §§ 1321–1341 (1970).

[74] 18 U.S.C. § 3182 (1970).

[75] 413 F. 2d 683 (9th Cir. 1969).

[76] Treaty of June 1, 1868, 15 Stat. 667.

[77] 18 U.S.C. § 3182 (1970).

[78] See 18 U.S.C. § 1738 (1970).

In the *Turtle* case, the 9th Circuit could have interpreted the word territory in the statute to include the Navajo Tribe. Instead, the Court chose not to denominate the tribe as a territory for purposes of the statute. In fact, the only member of the statute in the opinion is in a footnote,[79] where the Court simply states that Art. 4, § 2 of the Constitution were not self-executing.

Because of the extradition statute is so similar to the full faith and credit enabling legislation,[80] the Court could have looked to the case concerning full faith and credit in relation to Indian tribes. Instead, the Court simply found that the Navajo tribe was not a territory only for purposes of this statute.

VI. HISTORICAL REASONS FOR THE FULL FAITH AND CREDIT CLAUSE

Perhaps the need for full faith and credit between states and tribes can be better understood if one examines the reasons why the concept was adopted into the Constitution of the United States.

Art. 5, § 1 of the Constitution was incorporated by the framers of the Constitution out of a vaguely articulated need to control relationships between the States rather than to extend mere comity to the law of nations.[81] One of the ironies of American history is that the debates regarding the Articles of the Confederation, the predecessor of the Constitution, were more concerned with the relationships between States and the ultimate disposition of western lands than they were with the more pressing issues of potential defeat by the British forces by the Indians of the West.[82] The States under the Articles of Confederation were considered separate sovereignties contemplating a perpetual union.

Notwithstanding, the framers of the Constitution realized that in order to survive, the relationship of States must be based on something stronger than the law of nations as reflected in Art. 4 of the Articles of Confederation. Although full faith and credit was just one element of concern, its role in the interrelationship of States can be better understood within the entire context of Art. 4 of the Articles.

> ART. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice expected, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States or either of them.
>
> If any person guilty of or charged with treason, felony or other high misdemeanor in any State, shall flee from justice and be found in any of the States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.
>
> Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Clearly, then, the full faith and credit provision of the Articles of Confederation is only part of a contemplated relational scheme between "semi-sovereign" entities. The need for full faith and credit was more than judicial economy; concepts of European comity were transformed into a system that made recognition of foreign judgments mandatory in order to promote congenial relationships between the States. Because of this need, full faith and credit from Art. 4 of the Articles of Confederation was adopted into the Constitution in 1789.[83]

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[79] 413 F. 2d 683, at 685, footnote 2 (9th Cir. 1969).

[80] See 18 U.S.C. § 1738 (1970).

[81] See generally, Nadelmann, supra note 21, at 53–59 and A. McLaughlin, A Constitutional History of the United States, 127 (1936).

[82] Radin, The Authenticated Full Faith and Credit Clause: Its History, 39 Ill. L. Rev. 1, 2–7 (1944).

[83] U.S. Art. of Confed., Art. IV (1777).

VII. REASONS FOR EXTENDING FULL FAITH AND CREDIT TO INDIAN TRIBES

The present relationship between states and Indian reservations is not unlike that which existed between the States in the Confederation in 1778.[84] The mutual interests of both the states and tribes are better served when the processes of resolving conflicts are institutionalized. A change in any factor may affect the application of the jurisdiction's law. This confusing jurisdictional morass often turns relatively simple problems between states into complex cases when they involve an Indian tribe and a state.[85]

With the Supreme Court's unanimous decision in *McClanahan* v. *Arizona Tax Commission*,[86] which held that Arizona was without power to impose or collect taxes against an Indian living on the reservation sources, it is apparent the problems of defining relationships resulting from overlapping degrees of self-government of the State and the tribe will continue. This will continue because *McClanahan* supports at a minimum the continuance of limited tribal self-government.

The inclusion of tribes into full faith and recognition procedures is one method of alleviating some of the tension that exists between states and tribes. A large part of the tension results from the barriers that jurisdiction creates to impede the normal relationship between citizens of each political entity. Full faith and credit, if mutually afforded between these entities, should alleviate some problems if only on a personal level. Tribes presently are exercising more of their residual powers; these powers are very similar to the general powers of a state or municipality and are not dependent on race. This extension of tribal power and its acceptance by the judicial, legislative, and executive branches of government mark a historic change in the position of Indian tribes in America. This would constitute an official recognition of tribal autonomy and its political permanence. Almost without exception, past policy of the United States towards Indians viewed them as a transient phenomenon. Indians were considered a temporary problem that eventually would solve itself by Indians being absorbed into the melting pot of America. The major policy issue in America as to Indians has been aptly characterized as a dispute as to whether to civilize and then Christianize or to Christianize and then civilize Indians.[87] But this is clearly no longer true. What has become apparent in the last decade is the realization that Indians and Indian tribes are not going to disappear.

With this change in policy, it is necessary to begin to integrate tribal government into the permanent fabric of America; Full Faith and Credit provides a beginning for institutionalizing this process. Each entity retains a degree of self-government, protected from encroachment from the others. But because of the unique status of states and tribes that has evolved, the nature of intercourse between citizens of states and tribal members is more volatile than that existing between citizens of different states. Reservations are physically within the geographic boundaries of States. Tribal members are citizens of the United States and the State in which they live. They are entitled to all the privileges and immunities of a United States citizen.[88] But, they also are entitled to certain privileges and protections: For example, their properties on the reservation are exempt from state taxes,[89] and income earned on the reservation is exempt from state income tax [90] and state sales tax.[91] The reservation itself is also immune from certain state regulation such as zoning laws,[92] building codes,[93] eminent domain,[94] and most importantly, from exercise of certain criminal and civil jurisdiction.[95]

While the inclusion of tribes into the use of Full Faith and Credit Clause is attractive for its philosophical and practical aspects, the unique status of Indian tribes suggests that such inclusion may be difficult to develop into a workable system between state and tribe solely through case law.[96] The approach used in *Jim* v. *CIT Financial Service Corp.*,[97] of funding the Navajo Tribe a territory for purposes of 18 U.S.C. § 1738 (1970) has some fundamental weaknesses, particularly in the area of statutory construction.

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[84] Radin, supra note 85, at 11–17.

[85] For an enlightening discussion of the complexities of civil jurisdiction on Indian reservations see Canby, Civil Jurisdiction and the Indian Reservation, 1973 Utah L.Rev. 206.

[86] 411 U.S. 164 (1973).

[87] A. Berkhofer, Salvation and the Savage 5 (1972).

[88] See *Felix* v. *Patrick*, 145 U.S. 317 (1892); *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948); Citizenship Act of 1924, Act of June 2, 1924, ch. 233, 43 Stat. 253.

[89] See *United States* v. *Rickert*, 188 U.S. 432 (1903).

[90] See *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973).

[91] See *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 658 (1965).

[92] See *Snohomish County* v. *Seattle Disposal Co.*, 425 P.2d 22 (Wash. 1967) and 25 C.F.R. § 1.4 (1975).

[93] Id.

[94] See 25 U.S.C. §§ 311–328 (1970).

[95] See Vollman, Criminal Jurisdiction in Indian Country: Tribal Sovereignty and Defendant's Rights in Conflict, 22 U. of Kan. L.Rev. 387 (1974).

None theless, the need to institutionalize relationships between state and tribe still remains. This need can best be understood within the context of two cases: *Annis* v. *Dewey County Bank*[98] and *State Securities* v. *Anderson*.[99]

In Annis, the plaintiffs sought a permanent injunction enjoining the defendant and South Dakota state officials from coming onto the Cheyenne River Sioux Indian Reservation in order to enforce a judgment obtained in a South Dakota state court against plaintiff. Plaintiff successfully argued that, although the state court may have had power to adjudicate the merits of the notes, they lacked power to enforce any judgment entered by the state court. The crucial issue in the case was not whether state court had the power to adjudicate the initial cause of action, but whether the attachment, to be successful, had to be performed on the reservation. The Federal District Court upheld plaintiff's claim of no state power by citing *Williams* v. *Lee*,[100] *and Kennerly* v. *District Court of Montana*.[101] However, the Court allowed a counterclaim that defendant sought under the theory of pendant jurisdiction. The Court admitted that by granting defendant's counterclaim it was preventing the defendant bank from having an out-of-pocket loss and the plaintiff from becoming unjustly enriched by being able to keep cattle he had not paid for. Significantly, the Court went on further to say, "The result of granting plaintiff an injunction without granting defendant relief on his counterclaim would be to cut off credit to enrolled Indians living within the closed portion of the reservation." [102]

In the *State Securities* v. *Anderson*,[103] the New Mexico Supreme Court held that the New Mexico State District Court could obtain jurisdiction over Indians who had entered into a contract off of the reservation in New Mexico by issuing and serving process while they were on the reservation. The Court reasoned that to serve process on the reservation would not interfere with the tribe's right of self-government. They based this reasoning on *Kake* v. *Egan*,[104] an Alaskan case that said that the state's disclaimer of jurisdiction was of proprietary interest rather than of a governmental one, and as such, the state's exercise of its power to serve process was an exercise of governmental interest and, therefore, did not interfere with the tribe's right of self-government. While this case may be considered an anomaly in Indian law, its importance is pointed out by the dissent of Justice Montoya where he points out that "We are left in the anomalous position of allowing service of state process upon the Indian within the reservation in obtaining a judgment which, under the decided cases, cannot be enforced on the reservation." [105]

These two cases illustrate the need for some type of recognition procedure. In *Annis*, the federal court would not have had to stretch theories of pendant or ancillary jurisdiction to enter a counterclaim if the state court judgment had been entitled to full faith and credit by Cheyenne River Sioux Tribal Courts. Similarly, as in *Anderson*, one would not have been left with the anomaly that Justice Montoya points out, viz., allowing service of process in a cause of action that could result in an unenforceable judgment.

But implicit in institutionalizing the relationship between states and tribes is the loss of some degree of tribal autonomy. It may be that this type of tribal autonomy is well worth sacrificing for the benefit of the Indians living on the reservation. Indians living on the reservation who shop in border towns, especially when they purchase articles that require credit, usually must pay a premium if they are going to use the article on the reservation simply because they are forced to subsidize the defaults that may occur with others. If they were a workable system of enforcement of judgments, then perhaps there would be less defaults or less out-of-pocket losses to the seller. By eliminating the risk of not being able to collect debts, the price of credit for Indians would dramatically decrease.

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[96] See Canby, supra note 85, at 4–9. For a more theoretical discussion see comment, The Indian Battle for Self-Determination, 58 Calif. L.Rev. 445 (1970).

[97] 87 N.M. 362, 553 P.2d 751 (1975).

[98] 335 F. Supp. 133 (D.S.D. 1971).

[99] 84 N.M. 629, 506 P.2d 786 (1973).

[100] 358 U.S. 217 (1959).

[101] 400 U.S. 423 (1971).

[102] 335 F. Supp. 133, 138 (D.S.D. 1971).

[103] 84 N.M. 629, 506 P.2d 786 (1973).

[104] 369 U.S. 60 (1962).

[105] 84 N.M. 629, 636, 506 P.2d 786, 793 (1973).

It is, therefore, important that states, tribes, and the federal government begin by institutionalizing persent inter-governmental relations and developing new constitutions where none presently exist. Full faith and credit between tribe and state is a concept that, at little cost to tribe or state, would provide many mutual benefits. Although extension of full faith and credit has great practical application, its major benefit would be in its legitimizing influence on states as to the status of Indian tribes within the framework of the American system. Although the inclusion of tribes into the full faith and credit system would be a significant step forward in institutionalizing state-tribe relations, application of the full faith and credit system to tribes on a mutual basis is doubtful because of the unique status of Indian tribes. Because of this, the validity of *Jim v. CIT Financial Service Corp.*,[106] is questionable. Nonetheless, the issues raised in the case are important enough to explore in detail.

VIII. ASSUMING THE NEW MEXICO COURT IS CORRECT, MUST THE NAVAJO TRIBE ACCORD FULL FAITH AND CREDIT TO STATES AND OTHER TRIBES?

In 1884, the Supreme Court in *Elk v. Wilkins*[107] held that an Indian's constitutional rights under the 15th Amendment[108] were not violated when a state denied him the right to vote because he was not a citizen under the 14th Amendment.[109] The Court reasoned that general acts of Congress did not apply to Indians, unless so expressed as to manifest a clear intention to include them. Since the 14th Amendment did not address the issue of the status of Indians nor make special provision for those who sever their tribalties, such individuals could not be considered "born" in the United States. This case established the proposition that general enactments of Congress were not applicable to Indians unless expressly made so.

By this rule, 28 U.S.C. § 1738 (1970) should not be applicable to Indians because they are not expressly included in the statue. Today, this rule of construction is generally invalid. In *Navajo Tribe* v. *NLRB*,[110] the Court held that the National Labor Relations Board had jurisdiction over a labor dispute on the Navajo Reservation despite the Tribe's right to self-government, the Tribe's express wish to exclude unionization, and the Tribe's choice not to hold a representational election on the reservation.

The Court specifically stated that the congressionally announced policies of the National Labor Relations Board superceded the local policies of states and Indian tribes, even though the relevant legislation did not address the issues of jurisdiction on Indian reservations. In so holding, the Court directly addressed the concept of exemption for Indians from general legislation.

> The decision in *Elk* v. *Wilkens*, 112 U.S. 94 (1884), whatever its present-day significance, certainly does not operate to remove "Indians and their property interests" from the coverage of a general statute. * * * The National Labor Relations Act is a general statute. Its jurisdictional provisions, and its definitions of "employer", "employee", and "commerce" are of broad and comprehensive scope.[111]

The same reasoning process would appear to be applicable for mandatory requirement that Indian tribes adhere to 28 U.S.C. § 1738 (1970) and afford other states and territories full faith and credit. The statute is one of general application and seeks to promote judicial economy and to better inter-governmental relations.[112] The application of § 1738 to tribes would appear to carry out the mandate of Congress to include tribes in this process. The fact that the relevant full faith and credit statutes were passed when the *Elk* rule was apparently valid would appear to be unimportant. In *Navajo Tribe* v. *NLRB*, the application of the statute was restrictive; therefore, that the relevant portion of § 1738 was passed in 1804[113] should make little difference in its application. The issue is whether the statute is a general one. Using the *Navajo Tribe* case, it would appear that the inclusion of tribes as territories may be permissible, at least through statutory construction.

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[106] 87 N.M. 362, 553 P.2d 751 (1975).
[107] 112 U.S. 94 (1884).
[108] U.S. Const. amend. 15.
[109] U.S. Const. amend 14.
[110] 288 F. 2d 162 (D.C. Cir. 1961).
[111] Id. at 165, footnote 4.
[112] A. Von Mehren and D. Trautman, The Law of Multistate Problems 1228–30 (1965).
[113] Act of March 27, 1804, ch. 56, 2 Stat. 298.

Interestingly enough, however, the 9th Circuit Court of Appeals came to a different conclusion when considering the Navajo Tribe as a territory for purposes of the extradition statute.[114] In *Arizona ex rel. Merrill* v. *Turtle*,[115] the Court held that the State of Arizona had no power to extradite an Indian from the Navajo Reservation pursuant to the constitutional mandate of extradition demands made by Oklahoma. The Court based its reasoning on the Navajo Treaty of 1868[116] and the general principle of Indian law that those rights and powers not specifically taken away from the tribe still remain with the tribe. Under this case, then, one might argue that full faith and credit cannot be forced upon a tribe unless done so by congressional action.

Another possible barrier to inclusion of tribes in the full faith and credit system, except by Congressional Act, is a tribe's sovereign immunity. A tribal court refusing to recognize a judgment could not be challenged because of its sovereign immunity. This impediment, however, might be removed if a federal court construed 18 U.S.C. § 1738 (1970) as a waiver of sovereign immunity.

IX. WHAT ARE THE CONSEQUENCES OF HOLDING THAT THE NAVAJOS ARE A TRIBE WITHIN THE MEANING OF THE STATUTE?

Full faith and credit encompasses two separate but interrelated concepts: application of foreign laws in the forum state and recognition of foreign judgments by a second forum. Since the inclusion of tribes as territories in 28 U.S.C. § 1738 mandates both, it is necessary to discuss how each concept will affect the parties involved.

As to application of foreign laws, there is little issue. Presently, there is almost no practical, constitutional or statutory requirement for application of the laws of a foreign state in the forum state if the forum state has the proper jurisdictional basis to hear the case. Historically, the issue had been in what circumstances did the constitution compel a state to apply another state's law in its own courts.[117] The Supreme Court, in a series of workmen's compensation cases,[118] analyzed the circumstances when this application was necessary and concluded that full faith and credit did not require the application of a foreign state's law. Finally, in *Alaska Packers Assn.* v. *Industrial Accident Commission*, the Court, in determing that California was free to apply its workmen's compensation laws rather than Alaska's argued:

> * * * Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assume the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum. * * *
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> * * * [Here California's] interest is sufficient to justify its legislation and is greater than that of Alaska, of which the employee was never a a resident and to which he may never return.

The interest of Alaska is not shown to be superior to that of California.[119] This reasoning process, further refined in *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*[120] and *Carrol* v. *Lanza*,[121] has effectively extinguished the need for the states to apply foreign laws, at least under command of the full faith and credit clause or the relevant statute. The majority opinion in *Jim*, in addressing this issue quoted *Pink* v. *AAA Highway Express, Inc.* that "full faith and credit is not an inexorable and unqualified command."[122] Consequently, there is no constitutional or statutory requirement that a state or a tribe apply foreign laws in its own courts, assuming that the relevant court has jurisdiction. The effect of saying that tribes are territories for purposes of 28 U.S.C. § 1738 (1970) is to recognize the legitimacy of tribal government vis-a-vis states, but it does not require either entity to apply the other's laws.

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[114] 18 U.S.C. § 3182 (1970).

[115] 413 F. 2d 683 (9th Cir. 1969).

[116] Treaty of June 1, 1868, 15 Stat. 667.

[117] See *Hervey* v. *Rhode Island Locomotive Works*, 93 U.S. (30th) 664 (1876), *Walworth* v. *Harris*, 129 U.S. 355 (1889).

[118] *Bradford Electric Light Co.* v. *Clapper*, 286 U.S. 145 (1932); *Alaska Packers Assn.* v. *Industrial Accident Commission of California*, 294 U.S. 532 (1935); *Pacific Employers Insurance* v. *Industrial Accident Commission*, 306 U.S. 493 (1439).

[119] 294 U.S. 532, 547–550 (1935).

[120] 294 U.S. 532 (1935).

[121] 349 U.S. 408 (1955).

[122] 87 N.M. 362, 363, 533 P.2d 751, 752 (1975), citing 314 U.S. 201, 210 (1941).

While the issue in applying foreign statutes in the forum state is one of balancing the interest of the state against the need for uniformity in a federal system, the issue in recognizing judgments is the interest of the states balanced against the need for finality in a federal judicial system. While no state now has to subjugate its policies to a foreign state by applying foreign laws, it must subjugate its policies when recognizing judgments, because the need for finality outweighs individual state policies. The opportunity for states to lawfully avoid recognizing a judgment is extremely limited.

Although the Restatement of Conflicts[123] contains extensive materials on when a state may legitimately refuse to recognize a judgment, for purposes of this discussion the important consideration is the presence or lack of jurisdiction by the rendering court.

In a normal recognition of judgment situation between two states, the jurisdictional issue is normally whether, in the first action, in personam jurisdiction existed over the parties or, in rem or quasi in rem actions, whether or not the object attached or granished was physically within the jurisdiction.[124] In a relatively few cases, subject matter jurisdiction may be raised.[125] Subject matter jurisdiction is used here in its broadest sense: it may encompass causes of action denominated strictly as local which, for historical reasons, are not considered transitory or it may include issues of competence of the local courts as where the legislature has restricted the court's jurisdiction[126] or where a federal law or constitutional provision has prohibiting the state from acting.[127]

It is this last category that is of some importance to Indian Law and full faith and credit. The cornerstones of Indian Law were laid down by C. J. Marshall in *Worcester* v. *Georgia*.[128] In striking down Georgia statutes that restricted rights of the Cherokee Nation, the Court held that Congress's power over Indians was plenary.[129] All powers not taken away from the tribes by the United States still resided in the tribe. The states retained little power over Indian affairs. This was the general rule as to Indian state-federal relationships for 150 years.

In 1959, the Supreme Court of the United States modified or at least appeared to modify, *Worcester* by redefining the interests apparent in an Indian or state controversy. In *Williams* v. *Lee*,[130] a non-Indian owner of a trading post in the Navajo Nation brought suit in an Arizona State Court to recover for goods sold on credit to a Navajo. The Arizona Supreme Court held that Arizona had jurisdiction over the transaction since no federal law prohibited it, and in so doing, the Court failed to consider the possibility that the tribal court might have jurisdiction. In reversing, the Supreme Court formulated a new test for determining state power on an Indian Reservation.

> [A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the Rights of Reservation Indians to make their own rules and be ruled by them.[131]

The previous inquiry as to a state's power and asked whether Congress had authorized the state action. The introduction of an "infringement test" appeared to give a state new powers, particularly concerning individual Indians on the reservation. Applying the infringement test in *Williams*, the Court specifically found that implicit in Navajo treaty terms was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.[132] There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and would infringe on the right of the Indians to govern themselves.

For full faith and credit purposes, it is especially important to note that in

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[123] Restatement (Second) of Conflicts §§ 103–121 (1969).
[124] Id. at § ——.
[125] Id. at § ——.
[126] Id. at § ——.
[127] Id. at § ——.
[128] 31 U.S. (6 Pet.) 515 (1932).
[129] Id. at 561.
[130] 358 U.S. 217 (1958).
[131] Id. at 220.
[132] Id. at 221.

Williams Arizona was denied jurisdiction not on due process grounds, as *Williams* was personally served on the reservation and the transactions occurred within the geographical boundaries of the State—nor for lack of competency—since Arizona Courts had general jurisdiction to adjudicate a debt—but on the theory that Arizona's Act would interfere with tribal self-government. Arizona's lack of jurisdiction was similar to a lack of subject matter jurisdiction or a local action rule, since there was no relevant governing Act of Congress and to adjudicate the debt would infringe on the tribe's right of self-government.

To discuss full faith and credit in connection with jurisdiction, it is necessary to discuss two or more cases that establish the boundaries of existing state power over a reservation. In *Williams*, the fact that the Navajo had a functioning court system that would hear the dispute played a great part in finding that Arizona's action interfered with self-government. By comprison, in *McClanahan* v. *Arizona Tax Commission*,[133] there was neither a comparable Navajo income tax nor an effect on a tribal institution's power. Nevertheless, the Court found that Arizona's imposition of an income tax infringed on the tribe's right to self-government. Justice Marshall's majority opinion makes clear that *Williams* does not concern state power over Indians engaged in activity on the reservation. Instead, *Williams* was designed to resolve conflicts of state/tribal jurisdiction where non-Indians are involved.

In *Kennerly* v. *District Court*,[134] the Blackfoot Tribe of Montana had voted to grant to the State of Montana concurrent jurisdiction on civil matters on the reservation. The Supreme Court again held that the State was without jurisdiction in spite of the agreement. Because Congress alone has the power to grant jurisdiction over Indian tribes and because the requisite procedure established to allow Montana to assert jurisdiction had not been followed by the tribe or Montana, this claimed exercise of jurisdiction was void.[135]

When these three cases are read together, the status of state jurisdiction over Indian reservations for civil matters appears to be as follows:

(1) A state court may acquire general jurisdiction over a reservation only as prescribed by Congress. Any other method including tribal consent is invalid.

(2) Lacking general jurisdiction, a state has no power to adjudicate when the issue involves Indians engaged in reservation activity.

(3) If at least one party is a non-Indian, the court must inquire if the claimed state jurisdiction infringes on a tribe's right of self-government. If so, the tribe retains jurisdiction.

Given this jurisdictional quagmire, the defense of lack of jurisdiction to adjudicate actions against Indians in recognition procedures becomes extremely important.

This confusion can be illustrated by several hypotheticals. They employ a tort for a basis of analysis in order to avoid problems of U.C.C. analysis.

Plaintiff is injured in State X by defendant's negligent act. Defendant visits State Y on vacation. Plaintiff goes to State Y and sues defendant in a State Y Court. State Y has proper jurisdiction since the concept of transient causes of action allow plaintiff to "carry" his claim with him, even though State Y may choose either the laws of X or Y to decide the issues.

Plaintiff is injured on Reservation X by defendant's negligent act. Both plaintiff and defendant are Indian residents of Reservation X. Defendant takes a vacation to State Y which is off the Reservation. Plaintiff serves defendant in State Y to appear in a State Y Court, State Y has no jurisdiction since the cause of action is one between Indians occurring on a reservation.

Plaintiff, a non-Indian living on Reservation X, is injured by defendant's negligent act. Defendant visits State Y on vacation. Plaintiff goes to State Y and sues defendant in a State Y Court. State Y may or may not have jurisdiction depending upon whether the adjudication of the suit is an infringement of the tribe's right of self-government since the action arose on the reservation.

Plaintiff is injured on Reservation X by defendant's negligent act. Plaintiff and defendant are both non-Indian. Proper service is obtained on defendant by plaintiff to appear in State Y Courts. State Y may or may not have jurisdiction depending on the *Williams* test. The cases now seem to permit subject matter jurisdiction over off-reservation activities if there is proper in personam jurisdiction. Causes of action that are normally considered transient are treated as if they were local in nature if they fall within the *Williams* interference test.

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[133] 411 U.S. 164 (1973).

[134] 400 U.S. 423 (1971).

[135] Id. at 429.

Presently, the relationship between the tribes and states is based almost wholly on case law, with the exception of 25 U.S.C. §280 (1970), which provides the means for a state to assume jurisdiction over reservations with tribal consent and 25 U.S.C. § 231 (1970), which allows the state to make health and safety laws and mandatory school attendance. Outside of these two rather limited statutory exceptions, the relationship is shaped by the federal common law.

In order to fully understand the nature of he problem presented by *Jim* in the area of recognition of judgments, it is necessary to review three other areas of federal law as it relates to Indians:

(1) The non-applicability of the Bill of Rights to tribal activities,
(2) Tribal sovereign immunity, and
(3) The Indian Civil Rights Act of 1968.

The use of the Indian Civil Rights Act as a device for a collateral attach on tribal refusal to enforce a judgment can best be illustrated by the following hypothetical. P, a non-Indian, obtains a judgment against an Indian in state court. The Indians have been properly served and the court is within a normal situation competent to adjudicate the issue. P takes his judgment to a tribal court requesting recognition. The tribal court refuses on the grounds that the rendering state court was without jurisdiction because the issue in dispute, under the *Williams* test, interfered with the tribe's right of self-government. P now has nowhere to turn, he cannot appeal since the tribe has no appellate system, and even if it did there are no appeals from the tribal system to the outside. P cannot challenge the tribe in federal court because of the tribe's general sovereign immunity. Unless P can construct a Civil Rights argument and get into Federal District Court under the Indian Civil Rights Act he is without a remedy.

There is no comparable situation between states since in the above case P could challenge the second forum's USC decision would decide it on the basis of the Full Faith and Credit Clause rather than the Due Process Clause. But because of the unique legal status of Indian tribes, in order to obtain any plausible relief, P would have to file an action in the federal district court alleging that the tribe's refusal to recognize the judgment is a denial of due process. This would appear to be an extremely difficult argument to make.

There is no similar interference test or specific Congressional prohibition against the tribes assuming jurisdiction over non-Indians. Defenses that the tribes lacks jurisdiction are comparable to those that could be raised against any Court. When non-Indians are involved, the issue of tribal jurisdiction over non-Indians is raised but recent decisions support the assumption of tribal jurisdiction over non-Indians.

Although full faith and credit does not change the jurisdictional relationship between states and tribes, the unique aspects of Indian law in a context of full faith and credit recognition of judgment may allow both entities to examine the other's jurisdiction. This examination has special importance for tribes when states determine that their courts have proper jurisdiction on the basis that the tribe's right of self-government has not been infringed. States, on the other hand, are concerned with the issue of tribal jurisdiction over non-Indians. Both the tribe and the state view these two issues as vital for their own sovereignty. Full faith and credit posts the situation where courts least sympathetic to the views of the rendering court as to the vital problem of jurisdiction, must accept the rendering court's findings. The problem posted by full faith and credit for tribes is further complicated by the dual concept of tribal sovereign immunity and the fact that tribes are not subject to the restrictions of the United States Constitution.

The Supreme Court case *Talton* v. *Mayes*[136] is important in considering the extension of the Bill of Rights to Indians.

On the last day of 1892, Bob Talton, a Cherokee Indian was convicted of the murder of another Cherokee by a special Supreme Court of the Cherokee Nation. He sought habeas corpus relief, against Washington Mayes; high sheriff of the Cherokee Nation, in the Circuit Court of the United States for the Western District of Arkansas on the grounds that the murder indictment was returned by a grand jury of five persons, in contravention of the Fifth Amendment to the United States Constitution.[137] The district judge dismissed the writ and remanded Talton to Mayes' custody. On appeal, the Supreme Court of the United States affirmed the dismissal, holding that the guarantees and prohibitions of the Fifth Amendment were not applicable to courts of the Cherokee Nation. Even though the powers of self-government exercised by the Cherokees "are subject to the supreme legislative powers of the United States, the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constittution, they are not operated upon by the Fifth Amendment, which as we have said, for its sole object to control the powers conferred by the Constitution on the national government".[159]

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[136] 163 U.S. 376 (1893).
[137] U.S. Const. amend V.

Despite the fact that in later cases, the Supreme Court found that the Fourth, Fifth, and Sixth Amendments were applicable to the states by virtue of he Due Process Clause of the Fourteenth Amendment, federal courts have adhered to the view that self-governing Indian tribes were not bound by the substantive and procedural provisions of the Bill of Rights or the Fourteenth Amendment.

The religious freedom clause of the First Amendment was not operative upon the Navajo Tribe, and thus, the tribe could prohibit the importation of peyote onto the Navajo Reservation, even though the substance was the prime ingredient in the rites of the Native American Church. Similarly, the Due Process Clause of the Fourteenth Amendment did not impose the First Amendment's command of religious freedom so as to give relief to a Protestant when a Catholic Tribe had refused it the right to practice its religion. The controversy was held not to be cognizable under the Civil Rights Act of 1871 because the tribe's action was not a state action.

Claims alleging that tribal action constituted a taking of property without due process of law and a denial of equal protection of the laws have been dismissed for lack of jurisdiction on the grounds that the tribes were lawfully exercising their powers as self-governing entities. As to procedural due process rights, the Sixth Amendment's right to counsel was found not to be applicable to tribal courts, a tribal court was suggested as a forum for vindicating due process rights claimed to have been violated by the exclusion of a non-Indian lessee from the reservation. The only case where a constitutional right was successfully asserted by an Indian against another Indian was, *In Re Sah Quab*, where the Court faced a Tlingit Indian who had been held in slavery by another Indian since boyhood. The court reasoned that the Thirteenth Amendment is broad of scope and is enforced by the Civil Rights Act of 1866,[160] which aimed at extirpating every last relic of slavery and involuntary servitude.

In 1965, the Ninth Circuit Court of Appeals in *Colliflower* v. *Garland* held that since the Court of Indian Offenses on the Fort Belknap Reservation in Montana had functioned as a federal agency, a federal court could inquire into the legitimacy of the petitioners detention in a habeas corpus petition. Although the court specifically stated that this decision required the tribe to comply with every constitutional restriction applicable to state and federal courts, the court did in dicta doubt the continued broad validity of *Native American Church* v. *Navajo Tribal Council*.

The *Colliflower* case marks the beginning of the end of tribes' freedom from constitutional restraints. The Court's reasoning was based upon the support given the tribe by the Federal Government in training, funding, and regulating Courts of Indian Offenses. In 1969, the Ninth Circuit held that the Yakima Tribal Court was also an arm of the Federal Government although many of the seemingly crucial elements that mandated the *Colliflower* decision were not present in Yakima.

In 1968, Congress passed the Indian Civil Rights Act, which mandated that Indian tribes adhere to certain enumerated constitutional restraints. The motive in the Act was to insure that no American citizen would be denied certain fundamental liberties by any government within the United States certain fundamental liberties. There exists among Indians great debate on the value of this Act. One view is that it is protective since it restricts the application of the Constitution to tribes through the *Colliflower* case. Another view is that the Act is an unwarranted intrusion on Indian sovereignty and the ultimate destruction of Indian culture.

But for purposes of the full faith and credit analysis, the crucial issue is the meaning of the words in 25 U.S.C. § 1321 (1970):

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[159] 163 U.S. 376, 384 (1893).

[160] 342 F. 2d 369 (9th Cir. 1965).

> . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.[140]

The crux of the problem presented by recognition of judgments in the state-Indian confrontation arises in the following situation.

Assume that a court in State X finds that it has subject matter jurisdiction over the cause of action. State X then grants a judgment for plaintiffs. Plaintiffs then request a court in State Y to enforce the judgment against a defendant in Sate Y. Defendant in the State Y court raises as a defense to enforcement that State X's court lacked subject matter jurisdiction, that X was without jurisdiction to determine the issues. At one time, the issue of subject matter jurisdiction was considered to be always open to collateral attack.

Mr. Justice Bradley stated the doctrine in the leading case of *Thompson* v. *Whitman:*

> We think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution and the law of 1870, and notwithstanding the averments contained in the record of the judgment itself.[141]

The principle has been restated and applied in a variety of contexts.

However, the court in *Durfee* v. *Duke*,[142] in determining that a Federal District Court sitting as a Missouri Court could not reexamine the issue of subject matter jurisdiction that had been previously litigated in a Nebraska Court, determined that the criteria for collateral attach on subject matter jurisdiction should be like that for in personam jurisdiction.

> [T]here emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.[143]

Consequently, State Y must enforce the judgment of X if it finds that the issue of either subject matter or in personam jurisdiction has met the minimal Constitutional requirements fully, finally, and fairly litigated in State X. State Y's failure to recognize the judgment of State X after finding that X's jurisdictional determination was sufficient may be appealed to X appellate courts not on the merits of jurisdiction as determined by X but on Y's refusal within the limits consonant with due process and full faith and credit to allow Y to ignore X's judgment.

If the losing party wishes to challenge the findings of subject matter jurisdiction in the rendering forum, it may only do so on appeal through the rendering forum appellate structure. This structure when examined in state and tribal full faith and credit recognition situation creates problems that may be cause for reexamination of the very concept of full faith and credit between tribes and states. Assume that the same factual situation is presented except that the entity refusing to give recognition is the tribe.

State X has determined that they have jurisdiction over a particular matter and grant judgment. The judgment creditor then takes his judgment to have it enforced by the tribe. The tribe refuses on the grounds that the rendering court in State X is without jurisdiction. At that point, the judgment creditor remedies are limited to those internal procedures that the tribe has established. There is no appeal outside of the tribal structure. Consequently, there is no neutral forum to adjudicate the issue directly.

The only way to challenge a tribe's failure to enforce the judgment would be through filing a suit in Federal Court under the Indian Civil Rights Act of 1968 alleging that the tribe's failure to recognize the judgment in a violation of due process or arguing that general acts of Congress that apply to Indian tribes imply a waiver of a tribe's sovereign immunity in order to effect a remedy.

Whether or not a suit of this nature would be successful is a difficult question requiring examination of possible exceptions to collateral examination of subject matter jurisdiction noted in *Durfee* and an understanding of the Indian Civil Rights Act's due process provision.

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[140] 25 U.S.C. §§ 1301–1341 (1970).
[141] 85 U.S. (18 Wall.), 457, 469 (1873).
[142] 375 U.S. 106 (1963).
[143] Id. at 111.

In *Durfee* v. *Duke*,[144] the Court pointed out two possible exceptions to the general rule of finality of jurisdictional determinations: the doctrines of federal pre-emption and sovereign immunity. These exceptions embody judgment that in some situation the need for a correct juisdictional finding overrides the need for finality and judicial economy. While both of these doctrines provide a potential reason for allowing a collateral attack on jurisdiction, particularly in the Indian situation, it still leaves the fundamental issue of having a neutral forum to determine whether the reasons are sufficient. The court in *Durfee* also noted:

> The Restatement of Conflict of Laws recognizes the possibility of such exceptions: "Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction. Among the factors appropriate to be considered in determining that collateral attack should be permitted are that:
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> (a) the lack of jurisdiction over the subject matter was clear;
> (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
> (c) the court was one of limited and not of general jurisdiction;
> (d) the question of jurisdiction was not actually litigated;
> (e) the policy against the court's acting beyond its jurisdiction is strong."
>
> Restatement, Conflict of Laws, § 451(2) (Supp. 1948). See, Restatement, Judgments, § 10 (1942.).[145]

But again, the problem is not whether a tribe would be allowed to refuse recognition in some instances but rather whether it is possible to provide a neutral forum that would decide if it could. This leads one again to the fundamental issue of how could one examine a tribe's action in refusing a judgment.

Suits against Indian tribes are barred by the tribe's sovereign immunity. The sovereign immunity of an Indian tribe may only be waived with the "consent" of Congress. [*U.S.* v. *U.S. Fidelity & Guaranty Company*, 309 U.S. 506 (1940); *Turner* v. *United States*, 248 U.S. 354 (1919); *Adams* v. *Murphy*, 165 F. 304 (8th Cir., 1908); and *Thebo* v. *Choctaw Tribe*, 66 F. 372 (8th Cir., 1895)]. The immunity of Indian tribe and the United States is coextensive. *U.S.* v. *Fidelity & Guaranty Company*, *supra*. Since the immunity of Indian Tribe and the United States is analogue, the decisions construing what "consent" is for the purpose of U.S. sovereign immunity are of particular interest. "Consent" to suit by the United States means by statute.[146] Moreover, any acts of Congress waiving sovereign immunity must be strictly construed; exceptions to sovereign immunity are not to be implied.[147] The cases relating to the waiver of sovereign immunity by an Indian Tribe seem to follow the general rule laid down for waiver of U.S. exemption from suit.

Rather early, it was decided that a waiver of sovereign immunity by an Indian Tribe must be by Congress and the intention of Congress must be "expressed in plain and unambiguous terms." *Thebo* v. *Choctaw Tribe*, *supra*.[148] Further, no waiver by Congress was to be implied, it must be express.[149] Since Congress must express any waiver in clear and unambiguous terms, jurisdictional statute has never been held to be enough to waive sovereign immunity. The exception to this rule is the Indian Civil Rights Act. In *Thebo* v. *Choctaw Tribe*,[150] the court concerned itself with the following jurisdictional statute:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States or of any state or territory therein, and any citizen of a person or persons residing or found in the Indian Territory, and when the value of the thing in controversy or damages for money claimed shall amount to $100 or more." Supplemented by the "Act of Congress, May 2, 1890." [151]

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[144] 375 U.S. 106 (1963).

[145] Id. at 114, footnote 114.

[146] *U.S.* v. *Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).

[147] *United States* v. *King*, 395 U.S. 1 (1969); *Soriano* v. *United States*, 352 U.S. 270 (1957); *Sherwood* v. *United States*, 312 U.S. 584 (1940).

[148] 66 F. 372 (8th Cir. 1895).

[149] Id.; *Turner* v. *United States*, 248 U.S. 354 (1919).

[150] 66 F. 372 (8th Cir. 1895).

"That the court established by (Act of Congress, March 1, 1889) shall . . . have and exercise within the limits of the Indian Territory jurisdiction in all civil cases in the Indian Territory except cases over which the tribal courts have exclusive jurisdiction; and in all cases on contract entered into by citizens of any tribe or nation with citizens of the United States in good faith and for valuable consideration and in accordance with the laws of such tribe or nation and such contract shall be deemed valid and enforced by such courts." [152]

The court held that jurisdictional statutes are not express enough to waive sovereign immunity of the Choctaws from suit.

In *Adams* v. *Murphy*,[153] the 8th Circuit construed another jurisdictional statute, the "Curtis Act". [154] The statute stated in the relevant part:

> When in the progress of any civil suit pending in the United States court in any district in said territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit.[155]

The court held at 312:

> It was never intended in this indirect way to abolish the exemption of the tribe from civil suits.[156]

Turner v. *U.S.*,[157] is particularly interesting. In *Turner*, even though the jurisdictional statute specifically authorizes the Court of Claims to adjudicate *Turner's* claim against the Creek Indian Tribe, the court refused to find a waiver of sovereign immunity because the statute was jurisdictional in nature and, therefore, not an express waiver of Indian sovereign immunity by Congress. The statute authorizing the Court of Claims to adjudicate *Turner's* suit was § 26, of the Act of May 29, 1908, C. 216, 35 Stat. 444, 457, which stated as follows:

> That the Court of Claims is hereby authorized to consider and adjudicate and render judgment as law and equity may require in the matter of the claim of Clarence W. Turner of Muskogee, Oklahoma against the Creek Nation, for the destruction of personal property and the value of the loss of the pasture of the said Turner, or his assigns, by the action of any of the responsible Creek authorities, or with their cognizance and acquiescence, either party in the Court of Claims to have the right of appeal to the Supreme Court of the United States.[158] [248 U.S. at 356 and 357].

The court in passing on the language of the Act found it to be jurisdictional in nature and, therefore, not a waiver of sovereign immunity. The court stated as follows:

> The words of the Act . . . merely *identify* the claims to which the court is authorized to consider. Authority to sue the Creek Nation is implied but there is nothing in the act *which even tends* to indicate a purpose to create a new substantive right.[159]

Turner indicates how far the court was willing to go to find a statute that was jurisdictional in nature and that sovereign immunity is not hereby waived.

In *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*,[160] 28 U.S.C.A. § 1331 (1970), which gives federal question jurisdiction, was held not to waive sovereign immunity. It is also interesting to note that sovereign immunity of an Indian Tribe cannot be circumvented by suing the U.S. In *Haile* v. *Saunooke*,[161] imaginative counsel sued the federal government as trustee for the Indian tribe and argued that the Federal Torts Claim Act operated to waive sovereign immunity of U.S. and also the sovereign immunity of the Indian tribe. The court refuted the argument stating:

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[151] Id. at 373 quoting act of March 1. 1889. 25 Stat. 783.
[152] Id. at 373 quoting Act of May 2. 1890, 26 Stat. 93.
[153] 165 F. 304 (8th Cir. 1908).
[154] Act of June 28, 1898, ch. 517, 30 Stat. 495.
[155] Id.
[156] 165 F. 304, 316 (8th Cir. 1908).
[157] 248 U.S. 354 (1919).
[158] Act of May 29, 1908, ch. 216, § 26, 35 Stat. 444, 457.
[159] 248 U.S. 354, 358 (1919).
[160] 370 F. 2d 529 (8th Cir. 1967).
[161] 246 F. 2d 293 (4th Cir. 1957).

> In absence of consent by Congress, that these wards of the government cannot be sued, it is not permissible to accomplish the same result indirectly by suing the United States as trustee or guardian for them.

The court stated further:

> There is nothing in the Federal Torts Claim Act which authorizes any such suit. That act authorizes suits against the government for damages caused by an employment, not a suit against wards of the government nor against the government for damages resulting from their acts.[162]

So, generally speaking, waivers of sovereign immunity must be by Congress and must be express. The courts will not imply a waiver from a jurisdiction statute and will not allow circumvention of the doctrine by suing the U.S. as a trustee or a guardian for the Indian. As a consequence of this line of cases, one must conclude that a court would be extremely reluctant to find that 28 U.S.C. § 1738 (1970) was both a waiver of a tribe's sovereign immunity and a substantive cause of action since the statutes at least from its sparse legislative history and a literal reading of the statute itself does not mention Indians. Additionally, the alternative of suing the individual judge to circumvent the tribe's immunity appears to be barred. Although it must be noted that the last important non-Indian Civil Rights Act sovereign immunity suit antedotes the line of cases implying a waiver in the Indian Civil Rights Act. The Indian Civil Rights Act has been interpreted to be a waiver of tribal sovereignty although it does not expressly do so. This is important for two separate reasons: first, it allows suits to be brought against the tribe under the act; and second, the breadth of the waiver in concert with case law may provide an alternative means of examining the tribe's conduct in the context of the full faith and credit requirement.

As to the first issue, although the individual could file an action in federal court alleging due process by the tribe, it is difficult to find a reasonable theory that a court could use. There is no comparable situation between states since all issues of refusal of recognition are decided under the full faith and credit provision rather than the due process clause. The argument that the tribe has denied an individual due process because it fails to recognize a judgment is tenuous at best. The tribe has given the individual notice and an opportunity to be heard; the concept that the tribe's adverse decision on the issue of jurisdiction is not appealable should not give rise to a due process claim. The Supreme Court has consistently avoided the issue of right to appeal as a due process argument in the state courts. It is difficult to imagine that the court would hold that a tribe's failure to recognize a judgment would be grounds for enlarging federal jurisdiction over tribes. In order to have a functioning full faith and credit process, it is necessary that there be a neutral forum, though perhaps incorrect, is final. Full faith and credit can exist only with this neutral party to referee disputes and enforce its decision.

By first recognizing the reluctance that courts have for allowing collateral attacks in full faith and credit proceedings, it may be of some value to pursue the concept of collateral attack. The concept of collateral attack is directly against the purpose of judicial economy, which is the major purpose of full faith and credit. Although a claim directly alleging that one has been denied due process may not prevail, courts have held that the Indian Civil Rights Act, combined with a pre-existing jurisdictional statute,[163] results in a court having jurisdiction of a suit brought under the Indian Civil Rights Act.[164] Since the court will hear such a suit, the practical result is that sovereign immunity is thereby waived. This particular reasoning is interesting in light of the holding in *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*,[165] [*supra*], which held before the enactment of the Indian Civil Rights Act that § 1331 did not operate to waive sovereign immunity. In *Dodge* v. *Nakai*,[166] the court found that there was federal jurisdiction under § 1331 as a case arising under laws of the United States[167] [the Indian Civil Rights Act]. The court in *Dodge* also found jurisdiction under § 1343(4) which states as follows:

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[162] Id. at 298.

[163] E.g. 28 U.S.C. § 1331 or § 1343 (4) (1970).

[164] See *Dodge* v. *Nakai*, 298 F. Supp. 17 (D. Ariz. 1968) and *Spotted Eagle* v. *Blackfeet Tribe*, 301 F. Supp. 85 (D. Mont. 1969).

[165] 370 F. 2d 529 (8th Cir. 1967).

[166] 298 F. Supp. 17 (D. Ariz. 1968).

[167] Id. at 21.

"The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person.

"(4) to recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote."[168]

The court in *Dodge* found jurisdiction by analogizing the Indian Civil Rights Act of 42 U.S.C. § 1982 (1970) and the case of *Jones* v. *Alfred H. Mayer Co.*[169] In *Jones*, a Negro deprived of the right to buy real property by the act of a private individual was given the right to enforce the terms of 42 U.S.C. § 1982, establishing jurisdiction under 28 U.S.C. § 1343(4). 42 U.S.C. § 1982 is a statute that by its own terms did not authorize the filing of a civil action but was merely declarative of the rights of citizens of the United States. In note 13 of *Jones'* opinion, the Supreme Court stated;

"The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not of course prevent a federal court from fashioning an effective equitable remedy."[170]

The court in *Dodge* found that the Indian Civil Rights Act like § 1982 is also a statute which by its terms does not authorize a civil action but is merely declarative of rights of persons subject to the jurisdiction of Indian tribal government. Analogizing to *Jones*, the court in *Dodge* held that the court had jurisdiction under 28 U.S.C. § 1343(4) as well as federal question jurisdiction under § 1331.

The court in *Blackfeet Tribe*,[171] used the same reasoning analogizing to *Jones* to find jurisdiction as against the Blackfeet Tribe under § 1343(4).[172] As in *Dodge*, there was no discussion at all of the sovereign immunity issue, the court merely held that the court had jurisdiction to adjudicate the claims against the tribe.

Subsequent cases have followed the *Dodge* and *Spotted Eagle* cases, sometimes with discussion of the issue of sovereign immunity and sometimes not, finding jurisdiction under both § 1331 and § 1343(4). *Loncassion* v. *Leekit*,[173] for example, after finding that sovereign immunity was waived by the Indian Civil Rights Act found that jurisdiction existed under § 1331. Among the cases finding jurisdiction under § 1343(4) are *Johnson* v. *Lower Elwha Tribal Community*,[174] *Laramie* v. *Nicholson*,[175] *Luxon* v. *Rosebud Sioux Tribe of South Dakota*,[176] *Solomon* v. *LaRose*.[177] In *Johnson* v. *Lower Elwha Tribal Community*,[178] [*supra*], the court citing *Loncassion* v. *Leekit*, [*supra*], held that the Indian Civil Rights Act served to waive sovereign immunity by implication. The court went on to state:

"Pre-existing grant of jurisdiction under 28 U.S.C. § 1343(4) serves as a basis upon which to enforce alleged violations of provisions of the Indian Civil Rights Act."[179]

Other cases have found jurisdiction under § 1343(4) without any discussion of the sovereign immunity issue. In *Laramie* v. *Nicholson*,[180] the court found jurisdiction under 28 U.S.C. § 1343(4) (1970), and the Indian Civil Rights Act[181] by merely citing *Johnson* v. *Lower Elwhat Tribal Community*. In *Luxon* v. *Rosebud Sioux Tribe of South Dakota*, the court found jurisdiction under § 1343(4) without any reasoning, citing *Spotted Eagle* v. *Blackfeet Tribe*, and *Dodge* v. *Nakai*.

Given this case law framework of an individual must argue that recognition of a proper judgment of another forum is protected civil right, even though a tribe's failure to recognize a judgment in a denial of civil rights under § 1343,[182] which has been incorporated into the Civil Rights Act.[183] While a court may find some merit in this argument, it is tenuous at best and clearly does not promote the purposes of the *Jim*[184] decision.

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[168] 28 U.S.C. 1343(4) (1970).
[169] 392 U.S. 409 (1968).
[170] Id. at 414, footnote 13.
[171] 301 F. Supp. 85 (D. Mont. 1969).
[172] 28 U.S.C. § 1343(4) (1970).
[173] 334 F. Supp. 370 (D. N.M. 1971).
[174] 481 F. 2d 200 (8th Cir. 1973).
[175] 487 F. 2d 315 (9th Cir. 1973).
[176] 455 F. 2d 698 (8th Cir. 1972).
[177] 335 F. Supp. 715 (D. Neb. 1971).
[178] 481 F. 2d 200 (8th Cir. 1973).
[179] Id. at 203.
[180] 487 F. 2d 315 (9th Cir. 1973).
[181] 25 U.S.C. §§ 1301–1341 (1970).
[182] 28 U.S.C. § 1343 (1970).
[183] 42 U.S.C. §§ 1971 et seq., 1981 et seq. (1970).
[184] 87 N.M. 362, 553, P.2d 751 (1975).

There is one other possible means of collateral attack. The theory for litigants would be to argue that a tribal court is an arm of the government and as such it is the United States that is denying the enforcement. This argument would appear to be against the intent of the Indian Civil Rights Act [185] since if Congress had wished this line of case to continue there would have been little need for the Act. Consequently, the Indian Civil Rights Act also functions as a protective device to prevent the wholesale application of obligations of states and the federal government to tribes.

It would appear that any suit brought under the Civil Rights Act, absent equal protection problems of only recognizing one race, would be tenuous. This, combined with the tribe's sovereign immunity and the questionable inclusion of tribes as territories in § 1738,[186] means that any fully workable full faith and credit arrangement between tribes and states has to be accomplished by Congressional legislation. Congress' power to act in this area is undisputed. The need for such legislation is apparent; the lack of formalized contact between Indian tribes and states results in nagging litigation; it turns simple matters into incredibly complex issues where the issues are framed as if the court could litigate Armageddon.

One possible means of making full faith and credit feasible between tribes and states would be to provide appellate jurisdiction in a federal court for review of refusal of judgment. This could be accomplished by amending 28 U.S.C. § 1738 (1970) to include tribes. This would require language such as the following:

> The federal district court shall have jurisdiction to review an Indian tribe's refusal to recognize a judgment of a state territory or tribe if that refusal is based upon a finding that the rendering court lack jurisdiction. Such a review would be limited solely to the question of jurisdiction and no inquiry into the merits shall be made. Upon a finding that the rendering court had proper jurisdiction, the federal court shall execute judgment.

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[185] 25 U.S.C. §§ 1301–1341 (1970).
[186] 28 U.S.C. § 1738 (1970).

APPENDIX XIV.—TAXATION POWERS OF TRIBAL GOVERNMENTS—SUMMARY OF SUPPORTING LEGAL AUTHORITIES

PREFACE

The Purpose of this Report is to document the Source of Tribal Taxing Power. The Report analyzes all of the major authorities which define the Source of this power.

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INTRODUCTION

The question of where or from what source tribal governments derive their powers to tax involves an historical analysis. Since Indian tribes pre-date the United States, and did not participate in the ratification of the Federal Constitution, it is clear that their taxation power does not derive from Federal sovereignty. It is also clear that powers of taxation were not delegated to Indian tribes by the States.

The source of taxation power is in the sovereignty of the Indian tribe itself. In theory, sovereignty exists because of association and collectively represents consent to be governed. But no matter how much an association may wish to express sovereignty it is practically limited by whether or not other associations in fact recognize it as an association or sovereignty. For this reason, the paper properly begins where it should be demonstrating that Indian tribes were recognized as sovereign powers. A fact from which follows the obvious, that sovereigns possess inherent powers of self-government.

The paper next considers the respects in which tribal sovereignty has been limited. Within the context of sovereignty and its limitations, taxation power is then considered.

This paper does not consider jurisdictional conflicts nor tax strategies necessary to resolve the jurisdiction vacuum created by *Williams* v. *Lee* and *McClanahan* v. *Arizona*. Nor does it consider the effects of 25 U.S.C.A. Sec. 1302(8). Rather, it more humbly starts at the beginning, and attempts to formulate the context in which the source of taxation power must operate.

RECOGNITION OF ABORIGINAL SOVEREIGNTY

Sovereignity represents an independent source of power. It is inherent in the nature of political associations which exist independently of other associations, and which do not derive their existence from delegations of power from superior sources. Sovereignty is a self-sufficient source of political power from which all specific powers are derived. The powers to make laws, to execute and apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, etc. are derived from the ultimate source of power inherent in association. Association is the source of all sovereign power, and it retains paramount control over its polity and constitution.

During the Age of Discovery, the question was raised as to whether or not aboriginal populations were possessed of sovereignty. For, if the aboriginal populations were indeed members of the human race, then under Natural law they possessed certain rights in common with all men, even if they were barbarians.

It was commonly recognized that barbarians also possessed powers of sovereignty, and all the attendant powers of government. Even if the Human law or Natural law under which the barbarians lived was inconsistent with the Eternal law of God as manifest in European regents, the barbarians were still accorded respect as sovereigns.

Franciscus de Victoria, and later Vattel in his "Law of Nations," formulated

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certain principles of international law which had direct application to European colonization in the New World. Victoria concluded that since the aboriginal peoples were human beings, they were as a consequence possessed of certain rights which should be accorded respect under Natural law. Admittedly, this principle came into conflict with more materialistic and expedient objectives aimed at resource exploitation. It is probably true that one of the reasons for massive baptisms of Indians was motivated in part by a desire to create enough Christians, who could therefore renounce barbarism and declare the European regent as sovereign. Such a declaration would relieve the European power of any duty to respect aboriginal rights; that all title and incidents to land passing to him in consideration for protection, law, and Christianity. Such a declaration would realize in fact, the theoretical harmony between Eternal law, as manifested through the European regent, and ultimate Christian Freedom, (See *Summa Theologica*, Fourth Article; Thomas Aquinas.)

In general however, the European powers recognized that short of a Christian revolution or a "just war," for violating internation rights of trade or travel, that discovery alone did not vest title to aboriginal lands. Notwithstanding the fact that Indians were barbarians, it was generally believed that they were "true owners" of the soil. Recognition of this fact however, posed certain problems. If Indians were rightfully vested with title to their lands and were "sovereigns," then under international law they could treat with other foreign nations. Recognizing tribal sovereignty meant that Indians could treat with the discoverer's foreign enemies and by alliance with them, erode its sphere of influence. Consequently, the discovery principle became a principle of international law which required European powers to respect each other's sole claim of right to extinguish aboriginal title in their areas of discovery. The discovery principle was a method of insuring that other powers would not treat with Indian tribes within that area; and similarly Indian tribes agreed by treaty, not to treat with other European powers. Of course, during times of war this principle was not operative.

Prior to the formation of the United States then, Indian tribes were recognized as independent foreign nations possessed of all the attributes of sovereignty. The treaty-making process amply supports this principle. Moreover, tribal sovereignty was not limited by treaties in which they agreed to treat only with a given European power. Since the power to treat is a power derived from sovereignty, a fortiori it is not a limitation, but rather, an expression of that power. Abrogation of treaties, equally, is a power inherent to sovereignty.

In the more modern era, however, tribal sovereignty has been subsequently limited by the power of the United States and by tribal constitutions. These limitations have not extinguished the source from which springs inherent powers of self-government, but have restricted the scope of that power's application.

LIMITATION BY THE UNITED STATES

Indian tribes maintained their separate status and did not enter into the compact which ratified the United States Consitution. After 1789 the new Federal Government recognized the independent sovereignty and status of the tribes by honoring previous treaties between them and Great Britain as well as through new treaties, acts of Congress and later through executive orders, (See *Holden* v. *Joy*, 17 Wall 211, 242–243 (1872); *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. No. 14251 (C.C. Mich. (1852), p. 346) It was a recognized principle of international law that although a weaker power might treat with a stronger power for its protection in exchange for concessions, that so to do, did not diminish the weaker power's sovereignty. For, treating is a specific power inherent to sovereignty, (See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, (1832.).)

Through discovery, conquest and treaty, however, the dominant power of the United States became preeminent. The Federal courts have articulated that the long standing policy of the United States Congress has been and still is, that an Indian tribe is an independent self-governing political body with inherent powers of sovereignty which can only be limited by the United States. This policy has been repeatedly reflected in the courts of the United States since *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, (1831); *Worcester* v. *Georgia*, supra.

It is significant that Congrss has continued to recognize that sovereignty, although "limited," still possessed inherent powers of self-government. Felix Cohen noted that: "Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation.

The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. These statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty, rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty." at p. 122.

It has come to be a recognized principle in American Indian law that Indian tribes are still possessed of a limited sovereignty and possess all those powers of government which have not been proscribed by the Federal Government.

LIMITATION BY TRIBAL CONSTITUTION

The first element of sovereignty, and the last which may survive successive statutory limitations of Indian tribal power, is the power of the tribe to determine its own government. In 1935–1940, great numbers of Indian tribes adopted the constitutional form of government under section 16 of the Wheeler-Howard Act (48 Stat. 984, 987). The Indian Reorganization Act as it was called, recognized that the constitutional form of government was not a source of power, but rather an instrument of limitation. Enumerated powers inherent in tribal sovereignty, 55 I.D. 14 (1934), were the object of constitutional limitation. IRA constitutions recognized that specific governmental powers were vested in Indian tribes prior to the enactment of the act of June 18, 1934 (48 Stat. 984). It also recognized that these inherent powers were safeguarded and protected by section 16 of the Act. But while recognizing that sovereign powers existed, the IRA constitution provided the instrument of limitation through which the manner of their "exercise" could be expressly defined and limited.

It is well accepted that constitutions may limit the exercise of power either absolutely, as in the Bill of Rights, or qualifiedly, as for instance by assigning certain powers to certain specific branches of government, or by conditioning the exercise of powers in prescribed ways. One consequence of constitutions as documents of limitation is that they limit powers even when they purport to grant them, for the express grant of powers in a document of limitation is usually interpreted to mean that the power must be exercised in the precise way in which it has been granted. It may mean by negative implication, moreover, that the specific powers granted by enumeration are "all" of the powers that may be exercised, because the enumeration of some may be taken to "prohibit" the exercise of those not enumerated; inclusio unius est exclusio alterius reasoning.

One method of constitutional interpretation is that since the Indian tribes still possess inherent powers of sovereignty without constitutional grant, one way to give meaning to a purported grant is not to draw a negative implication as to powers not included. This method of interpretation however, is generally precluded by a provision in the IRA constitutions that provides for review by the Secretary of the Interior for any resolution or ordinance which, by the terms of the constitution is subject to his approval. Although the IRA constitutions are documents of limitation and provide for approval by the Secretary of the Interior, they still reserve powers which were vested in the tribes before adoption and approval of the constitution. A typical example of such reservation of power is:

Constitution and Bylaws of the Fort Belknap Community Council (Approved December 13, 1935.) Article V: Powers of the Community Council. Section 4: Reserved Powers: "Any rights and powers heretofore vested in the tribes of the Fort Belknap Indian Community but not expressly referred to in this constitution, shall not be abridged by this article, but may be exercised by the people of the Fort Belknap Community through the adoption of appropriate bylaws and constitutional amendments."

Constitutional provisions in IRA constitutions which recognize the existence of prior vested powers of sovereignty, and constitutional provisions which provide means for enlarging the scope of constitutional powers consistent with sovereignty; provided a vehicle whereby Indian tribes may remove certain limitations, and grant hitherto "unexercised" powers. In this respect, IRA constitutions are similar to other forms of constitutional governments.

When the constitution incorporates matters not truly reflective of present values or needs, then it is likely to be less a frame of government and more of a geologic accretion of protections against fears of the past. So, for instance early IRA constitutions reflected a fear of unlimited powers of Indian tribes, as separate "foreign" nations within the borders of the United States. Furthermore for example, the failure to incorporate a specific taxing power into the constitutions by negative implication was held to exclude the exercise of such power. This reflected the fear of unbridled tribal power.

The majority of IRA constitutions reeflct these successive layers of fear, and severely limit tribal governments' freedom of action. Constitutions as documents of limitation however, have never extinguished inherent powers of tribal sovereignty; and do not present insurmountable obstacles to the expression of previously unexercised powers. The Uintah and Ouray Indian tribe of Fort Duchesae, Utah is an IRA tribe. In 1974 the U & O tribe sought sought to amend its constitution and, by ordinance No. 74–02, provide for a general taxing statute. The taxation provision was approved by the Bureau of Indian Affairs on April 18, 1974.

Ordinance No. 74–02

Be it enacted by the Uintah and Ouray Tribal Business Committee, by virtue of its inherent authority as a sovereign American Indian Tribe to provide for the general welfare and economic independence of the UTE Indian Tribe, such sovereignty so vested in said tribe having been recognized and approved by Act of Congress of June 18, 1934 (48 Stat. 984 as amended), and pursuant to the powers of the Tribal Business Committee as enumerated in the Constitution of the Ute Indian Tribe of the Uintah and Ouray Reservation, Article VI Section (h), that a Ute Indian Revenue Committee is hereby established with the power to levy, assess and enforce the collection of taxes.

Section 2 Declaration of Purpose

Insofar as is practicable, it is the intent and purpose of this ordinance to impose a sales tax on the gross receipts of all retail sales by Indians and on the gross receipts of all retailers engaged in selling tangible personal property at retail to Indians within the boundaries of the Reservation as such terms are hereinafter construed, and to promote consistency and uniform treatment of all persons so taxed, with the view of attaining economic self-sufficiency for the Ute Indian Tribe.

The Ute Tribe, by amending its constitution, demonstrates that hitherto "unexercised" powers can be exercised; it also demonstrates that the IRA constitutions recorgnize the reservation of such powers.

The two sources of limitation upon tribal sovereignty are these imposed by the United States through treaty, acts of Congress and limited delegations to States; and, self-imposed constitutional limitations on tribal sovereignty under the Indian Reorganization Act. The question that arises is whether or not tribal sovereignty has become so limited as to preclude its exercising powers of taxation over Indians and non-Indians. Stated another way, has the source of power become so impaired by intrusion and limitation as to prohibit taxation? The answer must assuredly be "no."

THE POWER TO TAX IS AN INHERENT POWER OF TRIBAL SOVEREIGNTY

Taxation is an essential attribute of inherent powers of self-government. Where the power of taxation has not been surrendered by the tribe to the United States or restricted by constitutional limitation, it remains an indispensible attribute of tribal autonomy. "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions." 55 I.D. 14, 46 (1934)

Thus, the power to tax has been recognized by the United States as a residual power of inherent sovereignty, (See 55 I.D. 14; M–36448, M–Sept. 13, 1957; M–Oct. 23, 1957.)

In *Crabtree* v. *Madden*, 54 Fed. 426, 429 (1893), the Federal courts recognized that taxation was an inherent attribute of tribal government. ". . . this tribe has carefully preserved its separate political identity, and that it is still managing its own affairs, and exercising, through officers of its own selection, legislative executive, and judicial functions within its territorial jurisdiction. The tax which it is sought to collect by this action was imposed by the laws of this tribe. If the tribe had lawful authority to impose it, it had equal power to prescribe the remedies and designate the officers to collect it."

Later, in *Maxey* v. *Wright*, 105 Fed. 1003 (C.C.A. 8th Cir. 1900), 54 S.W. 807, 809, the Federal courts again enunciated the proposition that powers of taxation were residual to the tribe's original sovereignty.

"In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw Nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor.* * *

"* * * The practical importance here of this proposition is that in the absence of express contradictory by treaty, or by statutes of the United States, the nation, and not a citizen, is to declare who shall come within the boundaries of its occupancy and under what regulations and conditions." at p. 809.

"But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances. Neither the United States, nor a State, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. . . ." at pp. 951–952.

"The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns," at p. 958.

Here, territorial sovereignty was coextensive with powers of taxation over nonmembers.

In recent years the proposition that powers of taxation are residual to inherent powers of a tribe's original sovereignty, was crystallized in the case of *Iron Crow* v. *Oglala Sioux Tribe of the Pine Ridge Reservation*, 231 F.2d 89 (1956). *Iron Crow* v. *Sioux Tribe*, approved of Felix Cohen's opinion, 55 I.D. 14, (1934) that the power of taxation is essential to he maintenance of any government, by stating that it was an "inherent attribute of tribal sovereignty which continues unless withdrawn or limited by treaty or by act of Congress is a proposition which has never been successfully disputed," (See *Iron Crow* supra, at p. 98).

Unlike *Crabtree* v. *Madden*, *Maxey* v. *Wright*, *Buster* v. *Wright*, or *Norris* v. *Hitchcock*, supra, *Iron Crow* v. *Oglala Sioux Tribe* did not rely specifically upon the power to tax as a residual power of tribal sovereignty. Rather, *Iron Crow* relied upon a specific constitutional provision, much like the Uintah and Curay Tribes above. This constitutional provision had been approved by the Secretary of the Interior.

"Inasmuch as it has never been taken from it, the defendant Oglala Sioux Tribe possess the power of taxation which is an inherent incident of its sovereignty. The tribe has seen fit to give orderly implementation to that power through the adoption of a constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. Sec. 476." at p. 98.

In *Iron Crow* v. *Sioux Tribe*, the court upheld the validity of an IRA Constitutional taxing provision as it was applied to a member of the reservation. In a more recent case, *Barta* v. *Oglala Sioux Tribe of the Pine Ridge Reservation*, 148 F. Supp. 917; (affirmed 259 F.2d 553 (1958), cert. denied, 358 U.S. 893.), the validity of the same IRA constitutional taxing provision was challenged by Albert J. Barta, a nonmember non-resident of the reservation. The court stated: "The plaintiff tribe was organized under the Indian Reorganization Act, 48 Stat. 984, as amended, 25 U.S.C.A. Sec. 476. The authority to levy the tax is found in Article IV, Sec. 1(h), or the Tribal Constitution, and the validity of the tax was sustained by this Court in the case of *Iron Crow* v. *Oglala Sioux Tribe*, D.C.' 129 F. Supp. 15, affirmed 8 Cir., 231 F.2d 89. at p. 917.

The court in *Barta* v. *Oglala Sioux Tribe*, upheld the validity of the taxing provision on the grounds of *Iron Crow* v. *Oglala Sioux Tribe*, and upon the fact that since the tribe had a Federally approved constitution, a Federal Question could be involved under 28 U.S.C.A. Sec. 1331. Therefore, the Federal court had jurisdiction to determine the validity of the tax. *Barta* v. *Oglala Sioux Tribe*, approved of the Circuit Court of Appeals holding that: "We conclude from the original precept of tribal sovereignty and the fact that the power of the Oglala

Sioux Tribe to impose the tax or license in question, * * * has been implemented by the Indian Reorganization Act, * * * that such power still exists, 194 F. Supp. 917, 918."

Barta v. *Oglala Sioux Tribe* supra, properly stands for the principle that a tribe may exercise its powers of taxation in one of two ways. First, in upholding *Crabtree*, and *Buster*, at 146 F. Supp. 917, 918, *Barta* recognized that the power of taxation was an inherent power of self-government derived from the tribe's original sovereignty. Secondly, *Barta* also recognized the importance of the IRA constitution as a potential limitation on this inherent power. But, since an adequate and validly approved taxing provision existed in the constitution, Article IV, Sec. 1(h), the dignity of its application attained Federal proportions, regardless of whether or not the taxpayer was a nonmember of the reservation.

As a general proposition of American Indian law, it may be stated that Indian tribes do possess the powers of taxation. The source of this power, like all political power, is derived from the tribe's original sovereignty. There have been limitations placed on the exercise of this power however. Generally, these limitations concern the interplay of Federal, State and local, and Tribal jurisdiction; as well as requirements of Due Process and Equal Protection of the law, under the 1968 Indian Civil Rights Act. These are subjects which are beyond the scope of this power.

As a source of power, sovereignty itself remains unimpaired and unextinguished. It is only in the application of that power that limitations may exist through the plenary power of Congress and its delegations, or through self-imposed constitutional restrictions. In conclusion, it must be noted that while Indian tribes possess inherent powers of taxation, that power alone is not in itself a solution to the judicious application of taxation.

ANNOTATED BIBLIOGRAPHY

This bibliography represents a list of the most important sources of information concerning the source of tribal sovereignty and tribal taxing power. For a list of the more important Federal cases on the subject see pages 11–14 infra.

1. Cases which discuss the status of treaties and tribal sovereignty: *Commonwealth* v. *Coxe*, 4 Dall. 170 (1800); *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823); *Worcester* v. *Georgia*, 6 Pet. 515 (1832); *Turner* v. *American Baptist Missionary Union*, 24 Fed. Cas. No. 14251 (C.C. Mich. 1852); *New York Indians*, 5 Wall. 761 (1866); *Holden* v. *Joy*, 17 Wall. 211 (1872); *Jones* v. *Meehan*, 175 U.S. 1 (1899); *U.S.* v. *Douglas*, 190 Fed. 482 (C.C.A. 8, 1911); and *Deere* v. *State of New York*, 22 F.2d 851 (D.C.N.D.N.Y. 1927).

These cases show the treaty making process. They also contain dicta which explain how the United States came to respect earlier treaties between Great Britain and various Indian tribes. They focus on original tribal sovereignty. This recognition is important, since it is upon understanding of tribal sovereignty that the taxing power is approached; that is, as a derived power.

2. Interior Department Opinions: 55 I.D. 14 (1934); M-36448, M-Sept. 13, 1957; M-Oct. 23, 1957.

Generally this opinion and memoranda concern the power of Indian taxation, and its application.

3. Opinion of the Attorneys General: 17 Ops. Atty Gen. 34; 134; 18 Ops. Atty Gen. 34; 36; and 23 Ops. Atty Gen. 214; 217; 219; 220; 528.

These opinions upheld the legality of various licenses/fees/(taxes) imposed by Indian tribes.

4. Felix S. Cohen, "*Handbook of Federal Indian Law*" (Univ. of N.M. Press 1970). (1) "Section 4. A History of Indian Treaties," pages 46–66. Particularly good with respect to acknowledgement by Europeans that under international law Indian tribes were regarded as sovereign powers; that they had transferable title to land; and that title could only be extinguished by governments which treated with Indian tribes. (2) "Chapter 7. The Scope of Tribal Government," pages 122–182 excellent discussion of the derivation of tribal powers. Among the derived powers, is the power to tax: Section 7, "The Taxing Power of an Indian Tribe," page 142. That the power to tax is inherent and not derived from a delegation from the Federal Government, see footnote 171, page 142.

5. Alice Riehl, "Taxation and Indian Affairs," Chapter IX; The American Indian Lawyer Training Program, Inc. "Manual of Indian Law" (1975). Ms. Riehl's analysis does not consider the source of the tribal power to tax, however, her article does contain an excellent Appendix of Opinions, Statutes, Law Review Articles, and suggested Bibliography.

6. General Background Reading, which is not particularly necessary, but helpful to understand the context in which early writers such as Victoria and Vattel wrote, would include: Thomas Aquinas, Summa Theologica, Questions 90–97. Aquinas' Treaties on Law provides the legal structure which subsequently becomes the basis of much of western law. For example, Franciscus de Victoria's writing reflect the same concern for moral obligation as opposed to the use of outright force, in treating with aboriginal populations. Aquinas philosophical analysis of law observes that law grows out of society; and that law achieves its results by imposing moral obligations upon its subjects. Although Aquinas is more concerned with the roots of moral obligation than why men live under law; his treatise focused on the importance of building a theoretical harmony between law and freedom. Within this context, Victoria and others found that Christian European rulers were bound by requirements of justice in dealing with aboriginal populations. Even if they were not Christians, their polity and their laws could still be just; and therefore due respect. The fact that European rulers were preempted from unjustly appropriating Indian lands, is in part based on Thomist philosophy. Internal law which recognized Indian tribes as foreign independent sovereigns, recognized the moral dictate of just dealings, and this was manifest in the treaty making process.

7. Story Const. Section 207.

APPENDIX XV: OGLALA SIOUX TRIBAL TAXATION SYSTEM CASE STUDY

Report on the Status of the Oglala Sioux System of Taxation

(Submitted by Ron J. Solimon, field researcher)

The Oglala Sioux Tribe of South Dakota has taken a serious step toward self-determination via the enactment of several tax ordinances. They are as follows: Land Sale Tax;[1] Grazing Permit Preparation Tax;[2] Land use Tax;[3] Occupation Tax;[4] Cigarette Tax;[5] and Retail Sales, Service, and Use Taxes.[6] The tax ordinances have been accumulated in a Tax Code drafted by counsel for the tribe in Washington, D.C.[7] The Tax Code will be reviewed by the Tribal Council and then submitted for review and approval/disapproval by the Commissioner of Indian Affairs. Of the taxes indicated above, the Occupation Tax[8] is the only one that is not being imposed because of its disapproval by the Commissioner. It will be resubmitted for approval as part of the "Oglala Sioux Tribal Tax Code". The Bureau of Indian Affairs has also noted a need for the tribe to provide certain services to the taxpayers of the Grazing Permit Preparation Tax and the Land Use Tax. The tribe has acknowledged this and is in the process of setting up a Tribal Land Office using revenues from the two taxes to offset administrative costs. It is interesting to note that when the tribe began its system of taxation it earmarked revenues denied from the original land use tax for use in the establishment of "Tribal Land Enterprises", a separate land purchasing unit of the tribe which is still in operation.

Collection of said taxes has presented traditional revenue department delinquency problems to the Tribal Treasurer who is primarily responsible for their collection and for accurate recordkeeping. The tribe has entered tax collection agreements with South Dakota concerning the Sales and Cigarette Taxes. The state is entirely responsible for the collection of the Cigarette Tax proceeds and for distribution of a computed per capita cigarette tax figure to the tribe on a quarterly basis.[9] The collection agreement with respect to the Retail, Sales Service and Use Tax Ordinance[10] recently has been modified to authorize the tribe to collect the taxes on its own behalf from Indian retailers. Under the terms of the agreement, the tribe agrees to remit seventeen percent (17%) of the total proceeds collected in the preceding quarter to the state on a quarterly basis. The tribe collects the other taxes via the Tribal Treasurer's Office. The collection system is simple in relationship to the collection, recordkeeping and accounting duties placed on the treasurer. Plans are being made to expand the Treasurer's office to include revenue agent(s) and additional clerical staff so that the tribe can assume full responsibility for collecting all the taxes. Objections to an overpayment of taxes are handled by the tribal treasurer and

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[1] The land sale tax was approved by Oglala Sioux Tribal Council Resolution No. 54–61, and subsequently amended by Oglala Sioux Tribal Executive Committee Resolution No. 71–38XB.

[2] The grazing permit preparation tax was approved by Oglala Sioux Tribal Council Resolution No. 71–08.

[3] The land use tax was approved by Oglala Sioux Tribal Council Resolution No. 68–52 and approved by the Bureau of Indian Affairs by letter dated August 28, 1968. It was subsequently amended by Oglala Sioux Tribal Council Resolution No. ———.

[4] The occupation tax was approved by Oglala Sioux Tribal Council Resolution No. 74–01, which was disapproved by the Commissioner of Indian Affair. It has been revised in response to the Commissioner's recommendations and is resubmitted for approval by the Commissioner as part of the Oglala Sioux Tribal Tax Code.

[5] The cigarette tax was approved by Oglala Sioux Tribal Council Ordinance No. 75–02. Pursuant thereto a cigarette tax collection agreement was entered into between the Tribe and the State of South Dakota on June 1, 1975.

[6] The retail sales, service and use tax was approved by Ordinance No. 70–03. A tax collection agreement between the Tribe and the State of South Dakota was initially entered into December 30, 1970, was extended on July 1, 1974, and was modified on October 10, 1975.

[7] Fried, Frank, Harris, Shriner and Kampelman.

[8] See footnote 4.

[9] Cigarette Tax Collection Agreement dated June 1, 1975.

[10] Modification of Sales, Service and Use Tax Collection Agreement dated October 10, 1975.

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objections to the basic validity of a tax would be handled by the Executive Council of the Tribe. Objections that require a judicial decree may be brought in the Oglala Sioux Tribal Court. It should be noted that objections to the system of taxation have been raised by non-Indians doing business on the reservation.[11]

The relationship between the state of South Dakota and the Oglala Sioux Tribe have been far more diplomatic than the relationships of other states and tribes, e.g., New Mexico and the nineteen (19) Pueblo tribes, the Mescalero Apache tribe, the Jicarilla Apache tribe and the Navajo Nation in regards to the taxation of leasehold interests on those reservations without any negotiations or agreements between the two. In recognition of the fact that there is no aspect of the relationship between a state and a tribal government that is more apt to become an area of friction and consequently, potential or actual litigation than that of taxation.[12] Lines of communication were kept open between the two sovereigns that enabled them to reach equitable and amiable agreements rather than preempting or ignoring one another's inherent taxing powers. Negotiations are taking place with respect to the future issuance of tribal license plates and for the imposition of a gasoline tax.

The revenues derived from the taxes are the foundation of the tribe's financial stability and independence. For example, in 1975, the total proceeds derived from taxes was $660,000 or approximately ninety-two percent (92%) of the total tribal budget of $720,000. Specifically, revenue derived from the Retail Sales, Service and Use Taxes were approximately $100,000 and Cigarette Taxes amounted to between $60,000 and $70,000. Thus, it can be said that the tribal government's functions are directly dependent on the tribe's ability to effectively collect the taxes and enforce penalties on delinquent taxpayers. The present status of the collecting office (tribal treasurer's office) is such that the tribe will encounter collection problems of greater magnitude in light of the tribe's recent assumption of tax collection duties as per the Sales Tax collection agreement.[13]

Overall, the tribe has taken a serious step in exercising its taxing powers and should be commended for its initiative and efforts that will serve as a guide to other Indian tribes.

Oglala Sioux Tribal Tax Code

REVISED CODE OF THE OGLALA SIOUX TRIBE

Chapter 13

Section 137. Land Sale Tax
Section 138. Grazing Permit Preparation Tax
Section 139. Land Use Tax
Section 140. Occupation Tax
Section 141. Cigarette Tax
Section 142. Retail Sales, Service, and Use Taxes

SECTION 137. LAND SALE TAX

There is hereby imposed upon the purchaser of alloted trust land a tax in an amount equal to four percent (4%) of the sale price.

SECTION 138. GRAZING PERMIT PREPARATION TAX

There is hereby imposed upon the holder of a permit of trust land for grazing purposes a tax of three percent (3%) of the total annual grazing rental due under all such permits held by such holder.

SECTION 139. LAND USE TAX

(1) *Imposition of tax.*—There is hereby imposed upon the holder of any permit or lease of trust land for agricultural or grazing purposes who is not a member of the Oglala Sioux Tribe or who is a member of the Tribe with the right to graze 300 head of cattle or more a tax at the rate specified in subsection 2.

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[11] See *Barta* v. *Oglala Sioux Tribe,* 250 F. 2d 553 (8th Cir. 1958).

[12] Knudson and Brown, Staff Report on Taxation (Task Force on Indian-State Government Relations), September 11, 1973), p. A-1.

[13] See footnote 10.

(2) *Rate of tax.*—The land use tax shall be levied at the rate of (a) ten cents per acre for grassland and (b) twenty-five cents an acre for meadow hay and agricultural crop-land land.

SECTION 140. OCCUPATION TAX

(a) *Definitions.*—The following terms used in section 140 shall have the following respective meanings;

Compensation: Salaries, wages, or other sums paid for personal services of whatever kind and in whatever form paid by an employer, including without limitation, the United States of America and the State of South Dakota, to an employee, excluding any amount paid as a contribution by the employer to accident or health plans for compensation (through insurance or otherwise) to an employee for personal injuries or sickness.

Doing business: Engaging in any occupation which consists in whole or in part, in the rendering of personal services by an employee to an employer in exchange for compensation.

Employee: Any person receiving compensation for personal services rendered within the exterior boundaries of the Pine Ridge Reservation who, under the usual common law rules applicable to the employer-employee relationhip, has the status of an employee.

Person: Individual, natural person, whether or not such individual is a member of the Oglala Sioux Tribe.

(b) *Imposition of tax.*—An occupation tax is hereby imposed upon all persons who are doing business within the Pine Ridge Reservation as employees of governmental agencies, including Federal, State, and Tribal entities, or of commercial, industrial, or manufacturing enterprises provided, however, that the occupation tax on employees of the Federal Government shall not become effective until the effective date of an amendment of the United States Internal Revenue Code which allows a deduction of taxes paid to an Indian tribe from Federal income tax.

(c) *Rate.*—The occupation tax shall be levied at the rate of: (1) 1 percent per annum of the compensation received by the taxpayer from $5,000 to $10,000. (2) 2 percent per annum of the compensation received by the taxpayer in excess of $10,000.

(d) *Payroll deductions.*—Any employer on the Pine Ridge Reservation shall, unless otherwise prohibited by law, deduct from the compensation of any employee doing business on said Reservation at regular pay periods an amount computed by multiplying the amount of compensation otherwise due with respect to to such pay period by the applicable occupation tax rate, all for the purpose of paying over such deducted amounts to the Treasurer.

(e) Report by employer.—Any employer on the Pine Ridge Reservation shall by April 20 of every year file with the Treasurer a list all employees of such employer doing business on said Reservation during the quarter year January 1–March 31, together with a statement of the compensation paid to such employees. Similar lists shall be filed by July 20 for the period April 1–June 30, by October 20 for the period July 1–September 30 and by January 20 for the period October 1–December 31.

(f) *Payment by employer.*—Any employer subject to the payroll deduction provision of subsection (d) hereof shall accompany the filing of the list under subsection (e) hereof with a payment of the amount of tax due.

(g) *Payment by employee.*—Any employee who is liable to pay this tax under the provisions of subsection (b) hereof but whose employer is not subject to the payroll deduction requirement provided for in subsection (d) hereof shall pay to the Teasurer by the same day by which payment is to be made under paragraph (f) hereof the amount of tax due for the preceding quarter year.

(h) *Liability of employers.*—Upon the failure of any employer subject to the provisions of paragraph (d) hereof to pay over to the Treasurer any amount of unpaid occupation tax on the due date, such employer shall forfeit and pay the amount of such tax for each such person whose taxes are not paid over together with a penalty of one percent per month or any fraction thereof added thereto and such obligation shall become a personal debt of the employer until paid in full.

(i) *Liability of employee.*—Any employee liable to make direct payment to the Treasurer under subsection (g) hereof who fails to make payment by the date the tax is due shall become liable for a penalty of one percent per month or any fraction thereof.

(j) *Collection by legal proceedings.*—The Treasurer is authorized and empowered on behalf of the Oglala Sioux Tribe to collect from any person or any employer owing any amount of occupation tax by legal proceedings in any court of competent jurisdiction the amount of such tax and penalty due and unpaid together with interest at the rate of six percent per annum. The tax imposed by this section together with all increases, interest, and penalties thereon, shall become from the time it is due and payable a personel debt of the person owing the tax until paid in full.

(k) *Consent to jurisdiction.*—All leases or other agreements which permit or authorize the lawful presence of persons who are not tribal members upon tribal land or individually owned Indian trust land, including all agricultural or commercial leases and all grazing permits, and all agreements for employment of any person within the exterior boundaries of the Pine Ridge Reservation shall henceforth contain the following provision:

> The undersigned [insert name of lessee, permittee, employee or other contract party who is not a tribal member] hereby irrevocably stipulates, consents and agrees to the jurisdiction of the Oglala Sioux Tribal Court in any action for the purpose of collecting or enforcing any Oglala Sioux Tribal tax.

No such agreement entered into which does not contain the provision set forth above shall be valid and binding upon the Oglala Sioux Tribe or enforceable against any person in the Oglala Sioux Tribal Court.

(l) *Enforcement against nonmembers.*—In addition to the institution of legal proceedings for the collection of the occupation tax, the Oglala Sioux Tribal Executive Committee is authorized and empowered, with respect to any person not a tribal member, (i) to prohibit such person from coming within the exterior boundaries of the Pine Ridge Reservation and to enforce such prohibition pursuant to section 112 of the Oglala Sioux Tribal Code; (ii) to prohibit such person from engaging in any business or other occupation within the exterior boundaries of the Pine Ridge Reservation; (iii) to prohibit such person from going upon any land owned by the Oglala Sioux Tribe for any purpose whatsoever and enforce such prohibition pursuant to section 111 of the Oglala Sioux Tribal Code; (iv) to cancel and rescind any lease, permit or other agreement between such person and the Tribe on the ground of failure to comply with the lawful ordinances of the Tribe.

(m) *Tax provisions, subject to applicable law.*—All rights, remedies, and powers provided for herein may be exercised only to the extent that the exercise thereof does not violate the Constitution of the United States and the laws of Congress enacted thereunder. If any provision of this Tax shall be held to be invalid, unconstitutional, or unenforceable, the validity of the other provisions of this Tax shall not be affected thereby.

SECTION 141. CIGARETTE TAX

(a) *Definitions.*—Terms used in this section shall have the following respective meanings:

(1) "Reservation," the Pine Ridge Indian Reservation, including all lands within the exterior boundaries of the Pine Ridge Indian Reservation, including fee patented lands, roads, bridges, waters and lands used for United States Government purposes.

(2) "Treasurer," the duly elected and acting Treasurer of the Oglala Sioux Tribe.

(d) "SDCL," The South Dakota Compiled Laws as amended.

(b) *Imposition of tax.*—There is hereby imposed, on all cigarettes held within the Reservation for sale to or by any Indian person, a tax at the following rates:

Class A, on cigarettes weighing not more than three pounds per thousand, six mills on each cigarette;

Class B, on cigarettes weighing not more than three pounds per thousand, nine and three-eighths on each cigarette.

(c) *Tax collection agreement.*—The Oglala Sioux Tribal Executive Committee is hereby authorized to enter into an agreement with the State of South Dakota to provide for the collection of the tax imposed in section 2 of this Ordinance in accordance with the form attached hereto and incorporated by reference herein. Such agreement may provide for the retention by the State of South Dakota of a collection fee of not more than one (1) percent of the total tribal cigarette taxes collected annually and may provide that, in lieu of the exact amount of the tax imposed by this Ordinance, the State of South Dakota may remit to the Oglala Sioux Tribe an amount of money to be computed as follows: an amount equal to the total cigarette tax revenue collected in any one calendar year by the State of South Dakota in Shannon, Washabaugh and Bennett Counties pursuant to SDCL 10–50, or any successor provision of State law, and pursuant to the agreement provided for herein multiplied by a fraction, of which the numerator is the total number of Indians in Shannon and Washabaugh Counties according to the most recent figures employed by the U.S. Office of Revenue Sharing and the total number of Indians living on trust land in Bennett County according to the Bureau of Indian Affairs, and the denominator is the total population of Shannon, Washabaugh and Bennett Counties.

(d) *Cigarette stamps.*—It shall be unlawful for any person to sell cigarettes on this Reservation unless such cigarettes have been stamped pursuant to the laws of the State of South Dakota.

(e) *Tax on vendee, etc.*—The impact of the tax imposed by subsection (b) is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes and when this tax is paid by any other person such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user.

(f) *Preservation of records, etc.*—Every person subject to the payment of said tax shall keep such records and file such reports as may be prescribed by the Secretary of Revenue of the State of South Dakota pursuant to the SDLC 10–50, or any successor provision of State law, on all cigarettes manufactured, produced, purchased, sold, or delivered within the Pine Ridge Indian Reservation.

(g) *Criminal penalties.*—Any person subject to the jurisdiction of the Oglala Sioux Tribal Court who violates subsection (c) or fails to comply with any of the other terms of this tax, shall be guilty of an offense, upon conviction thereof, shall be sentenced to labor for a period not to exceed sixty days or pay a fine not to exceed five hundred dollars, or both, with costs.

(h) *Civil remedies.*—In case of the failure of any person to pay in full any amount of tax or penalty provided for herein, the amount therein may be recovered in a civil action of debt, and the Oglala Sioux Tribal Executive Committee is hereby authorized to bring such an action in the Tribal Court against any such person subject to the jurisdiction of the Tribal Court and in any court of competent jurisdiction against any such person.

(i) *Penalty.*—Any person subject to the payment of said tax who fails to pay the tax when due shall be subject to a penalty of ten percent for the first year or part thereof and six percent for each additional year or part thereof.

(j) *Confiscation of unstamped cigarettes.*—All cigarettes which are held within this Reservation for the purpose of a sale to or by an Indian and which have not been stamped, pursuant to SDCL 10–50, shall be subject to confiscation by tribal law enforcement officers.

(k) *Disposition of proceeds.*—All taxes or other amounts received by the Oglala Sioux Tribe pursuant to the provisions of this tax shall be deposited in the general fund of the Oglala Sioux Tribe and shall be expended only as the Oglala Sioux Tribal Council may direct.

SECTION 142. RETAIL SALES, SERVICE, AND USE TAXES

(1) *Definition of terms.*—The following terms when used in this section shall have the following respective meanings:

(a) "Business," includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect;

(b) "Commissioner of Revenue," and "Department of Revenue," mean the Commissioner of Revenue of the State of South Dakota, and the Department of Revenue of the State of South Dakota, respectively, during any period in which an agreement between the Tribe and the State of South Dakota as authorized by subsection (30) is in effect. During any other period such terms shall refer to the Treasurer of the Oglala Sioux Tribe;

(c) "Gross receipts," means the amount received in money, credits, property, or other money's worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses. Discounts for any purpose allowed and taken on sales shall not be included as gross receipts, nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. On all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof, only such portion of the sale amount thereof shall be accounted, for the purpose of imposition of tax imposed herein, as has actually been received in cash by the retailer during each quarterly periods as defined herein;

(d) "Indian," means an individual who is a member, either enrolled or eligible for enrollment, of any Indian tribe recognized by the United States or an organization composed exclusively thereof and organized under the Constitution and Ordinances of the Oglala Sioux Tribe;

(e) "Non-Indian," means any person other than an Indian;

(f) "Person," includes any individual, firm co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any group, or combination acting as a unit, and the plural as well as the singular in number;

(g) "Pine Ridge Indian Reservation," includes all lands within the exterior boundaries of the Pine Ridge Reservation established by the Act of March 2, 1889, 25 Stat. 888, including patented lands, roads, bridges, waters and lands used for U.S. Government purposes, other than the area described in the Act of May 27, 1910, 36 Stat. 440, provided that such exclusion shall be exclusive for the purposes of this Ordinance and shall not be applicable for any other purpose nor construed to waive or to deprive the Oglala Sioux Tribe of any rights or benefits under the Act of March 2, 1889, 25 Stat. 888, or otherwise.

(h) "Relief agency," means the State of South Dakota, any county, city and county, city, or district thereof, the Oglala Sioux Tribe or any governmental agency thereof, or any agency engaged in actual relief work;

(i) "Retail sale" or "sale at retail," means the sale of tangible personal property to the consumer or user thereof, or to any person for any purpose other than for resale; the sale of natural or artificial gas, electric energy, water, and communication service to consumers or users; and the sale of tickets or admissions to places of amusement or athletic contests;

(j) "Retailer," includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or the furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events, who engages therein at a place of business within the Pine Ridge Indian Reservation. "Retailer" also includes every person subject to the tax imposed by subsections (4) and (5). The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail does not constitute such person a retailer;

(k) "Sale," means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration;

(l) "Treasurer," means the duly elected and acting Treasurer of the Oglala Sioux Tribe.

(2) *Tax on sale of tangible personal property.*—There is hereby imposed as a tax upon the privilege of engaging in the business as a retailer on the Pine Ridge Indian Reservation, a tax of four percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise sold at retail in the Pine Ridge Indian Reservation, (a) by Indian retailers to any consumers or users or (b) by non-Indian retailers to Indian consumers or users. However, this tax will not be imposed on those items otherwise provided for in the following provisions.

(3) *Tax on sale of farm machinery and irrigation equipment.*—There is hereby imposed a tax of two percent on the gross receipts from the sale or resale of farm machinery or irrigation equipment used exclusively for agricultural purposes (a) by Indian retailers licensed by the Oglala Sioux Tribe or (b) by non-Indian retailers licensed by the Oglala Sioux Tribe with respect to sales to Indians; provided, however, that whenever any trade-in or exchange of used farm machinery is involved in the transaction, the tax shall only be due and collected on the cash difference.

(4) *Tax on receipts from professional and business services.*—There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property in this state upon the gross receipts of (a) any Indian from the engaging or continuing in the practice of any profession or of any business within the Pine Ridge Indian Reservation in which the service which is rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer, and of (b) any non-Indian from the engaging or continuing in the practice of any profession or of any business within the Pine Ridge Indian Reservation with respect only to the gross receipt from services rendered to Indians, except it shall not apply to those persons engaged in the practice of the healing arts and veterinarians as the same are defined in the laws of the State of South Dakota and who are licensed by an examining board under the laws of the State of South Dakota.

(5) *Tax on receipts from specific enumerated services.*—There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property by subsection (2) upon the gross receipts from engaging or continuing in any of the following businesses or services within the Pine Ridge Indian Reservation (a) of any Indian and (b) of any non-Indian with respect to sales or services to Indians: abstracters, accountants, architects, barbers, beauty shops, blacksmith shops, car washing, dry cleaning, dyeing, exterminators, garage and service stations, garment alteration, cleaning and pressing, janitorial services, laundry, linen and towel supply, photography, photo developing and enlarging, tire recapping, welding and all repair services, provided, however, that the specific enumeration of businesses and professions made in this section is not intended to, in any way, limit the scope and effect of subsection 4.

(5.1) *Coin operated washers and dryers—license.*—There is hereby imposed an annual license fee of five dollars for each coin operated washer and dryer in the Pine Ridge Indian Reservation, provided, however, that in municipalities the license fee for each coin operated washer and dryer owned and operated by a non-Indian shall be three dollars. Such license fee shall be in lieu of any sales or gross receipt taxes from the operation or ownership of coin operated washers and dryers. Any Indian who shall violate the provisions of this section shall be deemed guilty of an offense and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned for a period of not more than six months, or both. The license fees provided for herein shall be paid to the Commissioner of Revenue.

(6) *Tax on utility and communication services.*—There is hereby imposed a tax of three percent upon the gross receipts from sales, furnishing, or service of gas, electricity, water, and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity, and communication service to the public in its proprietary capacity, except as otherwise provided herein, when sold at retail from a place of business within the Pine Ridge Indian Reservation (a) by Indians to any consumer or user or (b) by non-Indians to Indian consumers or users.

(7) *Tax on room rentals to transient guests.*—There is hereby imposed a tax of three percent upon the gross receipt from room rentals received from transient guests of lodging establishments within the Pine Ridge Indian Reservation owned by Indians and of (b) room rentals received from Indian transient guests of lodging establishments within the Pine Ridge Indian Reservation owned by non-Indians. "Lodging establishment," shall mean any building, structure, property, and premise kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished in two or more rental units to transient guests. "Transient guest" shall be any person who resides in a lodging establishment less than twenty-eight consecutive days.

(8) *Tax on amusement and athletic events—records of income from amusement devices.*—There is hereby imposed a tax of three percent upon the gross receipts from all sales to Indians of tickets or admissions to places of amusement and athletic events within the Pine Ridge Indian Reservation and all such sales by Indians except as otherwise provided herein, and upon the gross receipts derived by Indian operators from the operation of pinball machines and other mechanical devices for amusement for which a charge is made for the operation thereof, mechanical phonographs, shooting galleries, bowling alleys, pool and billiard tables and upon such gross receipt derived by non-Indian operators from Indian customers. In case the operator is the lessee of the devices referred to in the last preceding sentence, such lessee shall be deemed the owner thereof for the purposes of this section. The operator of the machines above described shall

keep a record of the gross income derived from each of said machines and shall report the same to the Department of Revenue at the same time other sales tax reports are due upon forms prescribed by the Commissioner of Revenue.

(9) *Use tax.*—There is hereby imposed an excise tax at the same rate as the tax imposed by subsection (2) on the privilege of the use, storage and consumption within the Pine Ridge Reservation of tangible personal property purchased for use by Indians or used, stored and consumed by Indians or purchased within the Pine Ridge Indian Reservation from Indians for use within the Pine Ridge Reservation. The tax imposed by this subsection shall be interpreted and construed in the same manner as the South Dakota Use Tax Act, as amended, and regulations of the Department of Revenue issued thereunder, and this shall be considered a similar tax except that it shall apply only to use, storage and consumption by Indians or to purchase from Indians for use, storage or consumption.

(10) *Constitutional and statutory exemptions from taxation.*—There are hereby specifically exempted from the provisions of these taxes and from the computation of the amount of taxes imposed, the gross receipts from sales of tangible personal property which the Oglala Sioux Tribe is prohibited from taxing under the Constitution and Bylaws of the Tribe or under the Constitution or laws of the United States.

(11) *Exemption of certain sales.*—There are hereby specifically exempted from the provisions of these taxes and from the computation of the amount of taxes imposed, the gross receipts from sales to the Oglala Sioux Tribe, to the United States, to the State of South Dakota, or to public or municipal corporations in the State of South Dakota or any relief agency and the gross receipts from sales exempted from tax by the South Dakota Retail and Occupational Sales and Service Act, SDCL 1967, §§ 10–45–12, 10–45–13, 10–45–14, 10–45–15, 10–45–16, 10–45–17, 10–45–18, 10–45–19 and 10–45–20, as amended.

(12) *Tax additional to other occupation an privilege taxes.*—The taxes imposed herein shall be in addition to all other occupation or privilege taxes imposed by the Oglala Sioux Tribe, unless otherwise specifically exempted.

(13) *Addition of tax to price of sale or service.*—Absorption of price by retailer not to be advertised: Retailers may add the taxes impose by the above taxing provisions, as provided by law and where no provision is made, the average equivalents may be added. Any person whose services are taxed in subsection (4) or subsection (5) may add the tax under said sections, or the average equivalent thereof, to his price or charge. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by these provisions will be assumed or absorbed by the retailed or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded.

(14) *Schedule for collection of tax from customer.*—The following schedule is the basis for collecting the taxes imposed by the above provisions where said provisions are applicable:

$0.01 to $0.12	None	$1.13 to $1.37	$0.05
$0.13 to $0.37	$0.01	$1.38 to $1.62	.06
$0.38 to $0.62	.02	$1.63 to $1.87	.07
$0.63 to $0.87	.03	$1.88 to $2.12	.08
$0.88 to $1.12	.04		

and on each additional dollar or fraction thereof an increment in tax according to this schedule.

The rate prescribed herein shall be applicable to all excise, registration, or use taxes whose rate is fixed to or determined by the rate prescribed in subsection (2).

(15) *Application for retailer permit.*—Every retailer engaging in a business within the Pine Ridge Indian Reservation whose receipts are subject to tax under this Section 143 shall file with the Department of Revenue an application for a permit or permits, and shall file a duplicate original thereof with the Treasurer. Every application for such a permit shall be made upon a form approved by the Oglala Sioux Tribal Executive Committee and shall set forth the name under which the applicant transacts business, the location of his place or places of business, and such other information as the Executive Committee may require. The application shall be signed by the owner, if a natural person; in the case of an association or partnership, by a member or partner

thereof; or in the case of a corporation, by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. At the time of making such application, the applicant shall pay to the Commissioner of Revenue of South Dakota a permit fee of fifty cents for each permit, and the applicant must have a permit for each place of business.

(16) *Display of retailer permit.*—A permit issued by the Commissioner of Revenue pursuant to this Section 143 shall at all times be conspicuously displayed at each place of business within the Pine Ridge Reservation whose receipts are subject to tax hereunder.

(17) *Quarterly return and remittance.*—On or before the fifteenth day of the month following each quarter of the year, or at such other times as the Commissioner of Revenue may require or permit, every person who is subject to tax hereunder shall make a return and remittance to the Department of Revenue on forms prescribed and furnished by the Department.

(18) *Deduction allowed for sales refunds.*—Refunds made by a retailer during the reporting period shall be allowed as a deduction in case the retailer included the receipts, for which a refund is made, in the net taxable sales or has previously paid the sales tax.

(19) *Credit for taxes paid on worthless accounts.—Tax paid if account collected:* Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes, may be credited upon a subsequent payment of the tax herein provided; if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected.

(20) *Civil action for tax and penalty.*—In any case of failure of any taxpayer to pay tax or penalty when due, the amount of such tax and penalty may be recovered in a civil action of debt, and the Oglala Sioux Tribal Executive Committee is hereby authorized to bring such an action on behalf of the Tribe in the Tribal Court against any such taxpayer who is subject to the jurisdiction of the Tribal Court and in any court of competent jurisdiction against any other such taxpayer.

(21) *Termination of lease.*—The Oglala Sioux Tribal Executive Committee is hereby authorized to terminate upon fifteen days notice any lease or other agreement between the Oglala Sioux Tribe and any person who fails to pay the tax or penalty when due and any such person shall also be subject to the additional penalties provided for in Section 118 of the Revised Code of the Oglala Sioux Tribe.

(22) *Lien of tax and penalty.*—Any tax or penalty due from an Indian taxpayer shall be a lien in favor of the Oglala Sioux Tribe upon all property or rights to property whether real or personal, belonging to the taxpayer and upon any funds held to the credit of the taxpayer by the Bureau of Indian Affairs. In order to preserve the lien against subsequent mortgages, purchasers, or judgment creditors for value and without notice of the lien the Treasurer may file with the Oglala Sioux Tribal Court and with the Superintendent of the Pine Ridge Indian Agency a notice of said lien in such form as he shall elect. The Clerk of the Oglala Sioux Tribal Court shall prepare and keep a register of such liens, including the name of each Indian taxpayer, date of notice and time received, amount, and when satisfied. A duplicate register shall be maintained at the Pine Ridge Indian Agency.

(23) *Enforcement of lien.*—After notice of lien has been filed as provided in subsection (22) the Treasurer may apply to the Oglala Sioux Tribal Court for a distress warrant which may direct the Oglala Sioux Tribal Police to collect the tax by seizure and sale of personal property of the taxpayer in accordance with the procedures provided for by the laws of the State of South Dakota. The tax so collected shall be remitted to the Treasurer, but the Oglala Sioux Tribal Police shall be permitted to collect from the taxpayer and retain the compensation allowed under the laws of South Dakota prescribing the compensation of sheriffs for distress warrant procedure. After such notice is filed, the Treasurer is also authorized to apply to the Bureau of Indian Affairs for the payment of the amount due, or such lesser amount as may be held to the credit of such party by the Bureau of Indian Affairs.

(24) *Satisfaction of lien.*—Upon payment of the tax and penalty, the Treasurer shall file forthwith with the Oglala Sioux Tribal Court and the Superintendent, Pine Ridge Indian Agency, a satisfaction which shall be filed and recorded on the duplicate registers provided for in subsection (22).

(25) *Preservation of records—inspection by treasurer.*—Every person subject to tax hereunder shall maintain the books and records required under the Re-

tail Sales and Service Tax Act of the State of South Dakota, subject to all the terms and conditions specified therein. Such books and records and other pertinent documents and papers shall, at all times during business hours of the day, be subject to inspection and audit by the Treasurer of the Tribe or his duly authorized representative, to determine the amount of tax due.

(26) *Returns and investigations confidential—unauthorized disclosure—Penalty.*—All information received by the Treasurer from returns filed under this Ordinance, or from any investigation conducted under the provisions of this Ordinance, shall be confidential except for official purposes, and it shall be unlawful for any officer, employee, or representative of the Treasurer to divulge any such information in any manner, except as may be provided by law. Any person who divulges any such information, except as provided by law, shall be guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days or to pay a fine not to exceed $100.00, or both, with costs.

(27) *Violation of tax provisions.*—Any person subject to the jurisdiction of the Oglala Sioux Tribal Court who fails to comply with any of the above tax provisions shall be guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days or to pay a fine not to exceed $100.00, or both, with costs.

(28) *Disposition of proceeds of tax.*—All taxes and license fees received by the Oglala Sioux Tribe from the Department of Revenue or as otherwise provided herein shall be deposited in the general fund of the Oglala Sioux Tribe and shall be expended only as the Oglala Sioux Tribal Council may direct.

(29) *Overpayments.*—If it shall appear subsequent to the receipt of tax proceeds by the Tribe that an amount of tax, penalty or interest has been paid which was not due under this Section 143, whether as a result of a mistake of fact or of law, then such amount shall be credited against any tax due, or to become due, from the person who made the overpayment, or such amount shall be refunded to such person by the Oglala Sioux Tribal Executive Committee, provided that a claim for refund shall be filed with the Treasurer within three years of the collection of the overpayment by the Department of Revenue or said claim shall be forever barred.

(30) *Agreement with the State of South Dakota.*—The Oglala Sioux Tribal Executive Committee is authorized to enter into an agreement with the State of South Dakota to provide for the collection of the tax provided for herein. Such agreement may provide for the retention by the State of South Dakota of a collection fee of two and one-half percent of the amount of tax collected annually and may provide that a fixed percentage of the total annual tax proceeds collected by the Department of Revenue from the Pine Ridge Indian Reservation persuant to this Section 143 and pursuant to the South Dakota Retail Occupational Sales and Service Tax Act and the South Dakota Use Tax Act shall be paid to the Tribe in lieu of the exact amount of the tax imposed hereunder. The initial term of the agreement shall be for one year, subject to renewal at the election of the State of South Dakota and the Oglala Sioux Tribal Council.

ANNOTATIONS TO THE OGLALA SIOUX TRIBAL TAX CODE

Section 137.—The land sale tax was approved by Oglala Sioux Tribal Council Resolution No. 54–61, and subsequently amended by Oglala Sioux Tribal Council Resolution No. 67–68 and Oglala Sioux Tribal Executive Committee Resolution No. 71–38XB.

Section 138.—The grazing permit preparation tax was approved by Oglala Sioux Tribal Council Resolution No. 71–08.

Section 139.—The land use tax was approved by Oglala Sioux Tribal Council Resolution No. 68–52 and approved by the Bureau of Indian Affairs by letter dated August 28, 1968. It was subsequently amended by Oglala Sioux Tribal Council Resolution No. ———

Section 140.—The occupation tax was approved by Oglala Sioux Tribal Council Resolution No. 74–01, which was disapproved by the Commissioner of Indian Affairs. It has been revised in response to the Commissioner's recommendations and is resubmitted for approval by the Commissioner as part of the Oglala Sioux Tribal Tax Code.

Section 141.—The cigarette tax was approved by Oglala Sioux Tribal Council Ordinance No. 75–02. Pursuant thereto a cigarette tax collection agreement was entered into between the Tribe and the State of South Dakota on June 1, 1975. See Exhibit A.

Section 142.—The retail sales, service and use tax was approved by Ordinance No. 70–03. A tax collection agreement between the Tribe and the State of South Dakota was initially entered into on December 30, 1970, was extended on July 1, 1974, and was modified on October 10, 1975. The initial agreement, extension agreement, and modification are attached as Exhibits B, C, and D, respectively.

EXHIBIT A.—CIGARETTE TAX COLLECTION AGREEMENT

This Agreement, dated June 1, 1975, by and between the Department of Revenue of the State of South Dakota (hereinafter referred to as the "State") and the Oglala Sioux Tribe of the Pine Ridge Reservation (hereinafter referred to as the "Tribe"), an Indian tribe organized pursuant to Section 17 of the Federal Indian Reorganization Act, 25 U.S.C. § 476.

Whereas, the Tribe has jurisdiction to tax the sales of cigarettes by Indians and to Indians within the limits of the Pine Ridge Reservation; and

Whereas, the State of South Dakota has jurisdiction to tax the sales of cigarettes by non-Indians to non-Indians within the limits of the Pine Ridge Reservation; and

Whereas, the Department of Revenue is authorized, pursuant to SDCL 10–12A, to enter into tax collection agreements with Indian tribes;

Now therefore, in order to implement effectively their respective tax jurisdictions and to derive therefrom significant revenues to be expended for public purposes the parties hereto mutually agree as follows:

1. Collection of tribal cigarette tax.—The state hereby agrees to collect on behalf of the Tribe, the tax upon cigarettes imposed by Ordinance No. 74–02 of the Oglala Sioux Tribal Council (hereinafter referred to as the "Ordinance") and to issue all permits and stamps as may be provided in the Ordinance.

2. Remittance of tax proceeds.—The State agrees to remit to the Tribe, in lieu of the exact amount of the tax imposed by the Ordinance, an amount computed as follows:

The cigarette tax revenue collected subsequent to the effective date of this agreement by the State of South Dakota in Shannon, Washabaugh and Bennett Counties pursuant to SDCL 10–50, or any successor provisions of State law, and pursuant to this agreement multiplied by a fraction, of which the numerator is the number of Indians in Shannon and Washabaugh Counties respectively according to the most recent figures employed by the U.S. Office of Revenue Sharing and as to Bennett County the number of Indians living on trust land according to the Bureau of Indian Affairs, and the denominator is the total population of Shannon, Washabaugh and Bennett Counties respectively.

The State shall remit this amount on a quarterly basis using the computed per capita cigarette tax revenue figure. The final quarter payment for each year shall reflect any adjustments necessary to provide full payment in accordance with the actual per capita cigarette tax revenue figure for the year.

The State may retain out of its quarterly remittances to the Tribe a total annual amount of not more than one percent of the amount imposed by the Ordinance as an administrative fee. Remittances shall be made by the State Treasurer by check or warrant payable to the order of the President and the Treasurer of the Tribe.

3. Term.—This Agreement shall be for a term of one year beginning on the effective date of this agreement and shall renew thereafter for a term of one year on the same terms and conditions unless terminated in writing by either party upon thirty days notice in writing to the other party. In the event of termination by the State prior to the end of a quarter, the State shall be obligated to remit the full quarterly remittance provided for herein with respect to the quarter during which notice of termination is given, which obligation shall survive the termination of this Agreement.

Nothing contained herein shall prejudice the rights of the Tribe so far as cigarette tax revenues collected by the State between July 1, 1974 and the date of this Agreement are concerned and this Agreement may hereafter be amended as to the effective date of the same and any cigarette tax revenues theretofore collected by the State subsequent to such revised effective date shall be remitted to the Tribe on such basis as shall then be agreed upon.

This Agreement shall be effective on the first day of the month following the month when the same is executed by the parties hereto providing that the Ordinance shall then be in full force and effect.

In witness whereof, the State and the Tribe have caused this Agreement to be executed and delivered by their duly authorized officers.

THE DEPARTMENT OF REVENUE OF
THE STATE OF SOUTH DAKOTA,

[SEAL]

By ———, ———, *Secretary of Revenue.*

Date signed: May 29, 1975.

THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE RESERVATION,
By DICK WILSON, *President.*

[SEAL]
Date signed: June 3, 1975.

By ———, ———, *Secretary.*

Date signed: June 5, 1975.

EXHIBIT B.—TAX COLLECTION AGREEMENT

This Agreement, dated ———, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian tribe organized under the Federal Indian Reorganization Act:

Whereas, The Oglala Sioux Tribe has jurisdiction to tax sales by Indians and sales by non-Indians to Indians within the limits of the Pine Ridge Indian Reservation, and

Whereas, the State of South Dakota has jurisdiction to tax sales by non-Indians to non-Indians within the limits of the Pine Ridge Indian Reservation,

Now therefore, in order to implement effectively their respective tax jurisdictions and derive therefrom significant revenues to be expended for public purposes and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto mutually agree as follows:

1. *Collection of tribal retail sales, service and use tax.*—The State hereby agrees to collect on behalf of the Tribe the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance (the "Ordinance") and to issue the permits provided for in the Ordinance.

2. *Remittance of tax proceeds.*—The State agrees to remit to the Tribe on a quarterly basis an amount equal to ——% of the total proceeds collected by the State with respect to the preceding quarter of the taxes imposed by the Ordinance and (with respect to taxable transactions within the Pine Ridge Indian Reservation) the tax imposed by the South Dakota Retail Occupation Sales and Service Tax Act and the South Dakota Use Tax Act. The State may retain out of its quarterly remittances to the Tribe a total annual amount not in excess of two and one half percent of the total annual proceeds of the taxes imposed by the Ordinance. Remitances shall be by certified check, payable to the order of the President and the Treasurer of the Tribe.

3. *Term.*—This Agreement shall become effective on October 1, 1970, shall be for a term of one year and shall terminate upon the receipt of the fourth quarterly remittance from the State as provided for herein, unless sooner renewed at the election of the State and the Tribe upon terms and conditions as shall be mutually agreed, or unless terminated sooner by either of the parties upon thirty days notice in writing to the other party. In the event of termination by the State prior to the expiration of one year without the consent of he Tribe, the State shall be obligated to remit the full quarterly remittance provided for herein with respect to the quarter during which notice is given, which obligation shall survive the termination of this Agreement.

In witness whereof, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE DEPARTMENT OF REVENUE OF
THE STATE OF SOUTH DAKOTA,
By ———, ———,
Commissioner of Revenue.

THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE RESERVATION,
By ———, ———, *President.*
By ———, ———, *Secretary.*

TAX COLLECTION EXTENSION AGREEMENT

This Agreement, dated July 1, 1974, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Reservation (the "Tribe"), an Indian tribe organized under the Federal Indian Reorganization Act:

Whereas, the Oglala Sioux Tribe has heretofore entered into a tax collection agreement (the "Agreement") with the State pursuant to Ordinance No. 70-03; and

Whereas, the Oglala Sioux Tribal Council wishes to renew such agreement to be effective through June 30, 1975, and to be renewable thereafter;

Now therefore, in order to implement effectively their respective tax jurisdictions and derive therefrom significant revenues to be expended for public purposes and for other good and valuable consideration, receipt of which is hereby acknowledged, and parties hereto mutually agree as follows:

The Agreement is hereby renewed for a term ending June 30, 1975 and shall renew thereafter for additional terms of one year unless either party shall terminate the Agreement on or before June 1.

OCTOBER 1975.

EXHIBIT D.—MODIFICATION OF SALES, SERVICE AND USE TAX COLLECTION AGREEMENT

This Agreement, dated October 10, 1975, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian Tribe organized under the Federal Indian Reorganization Act:

Whereas, the Tribe by Ordinance No. 70-03 levied a Sales, Service and Use Tax on sales by Indian retailers to any consumers or users and on sales by non-Indian retailers to Indian consumers and users,

Whereas, the Tribe entered into a Tax Collection Agreement (the "Agreement") with the State of South Dakota, whereby the State, acting as an agent for the Tribe, collects the retail taxes imposed by Ordinance No. 70-03. The State, pursuant to this Agreement, remits to the Tribe an amount equal to 83% the total proceeds of the Tribal and State taxes collected within the Pine Ridge Reservation, of which 1% is retained by the State to meet its administrative costs.

Whereas, the Tribe wishes to implement more effectively the Ordinance and to collect the taxes provided therein, particularly with respect to the taxation of sales by Indian retailers,

Now therefore, in order to more effectively enforce Ordinance No. 70-03 and to derive thereby significant revenues to be expended for public purposes, the parties hereto mutually agree as follows:

1. Collection of certain taxes by the tribe.—The Agreement not withstanding, the Tribe is hereby authorized to collect on its own behalf from Indian retailers the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance.

2. Remittance of tax proceeds.—The Tribe agrees to remit to the State on a quarterly basis an amount equal to 17 percent of the total proceeds collected by the Tribe pursuant to this Agreement during the preceding quarter.

3. Depository. Records of tribal collections.—The Tribe agrees to deposit all taxes collected pursuant to this Agreement in a special account and to provide the State on a quarterly basis with a full statement on all taxes collected and all disbursements from the account. Remittances to the State shall be by certified check payable to the order of the Secretary of Revenue, State of South Dakota.

In witness whereof the State and the Tribe have caused this Extension Agreement to be executed and delivered by their respective officers thereunto duly authorized.

THE DEPARTMENT OF REVENUE OF
THE STATE OF SOUTH DAKOTA,
By ——— ———,
Commissioner of Revenue.
THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE RESERVATION,
By DICK WILSON, *President.*
By WILBERT BLACK FEATHER, SR.,
Secretary.

[TRIBAL SEAL]

This Agreement shall be considered as a supplement to the Agreement between the State of South Dakota and the Oglala Sioux Tribe of December 30, 1970 as extended by the Agreement of July 1, 1974.

In Witness Whereof, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

The Oglala Sioux Tribe of the
Pine Ridge Reservation,
By Dick Wilson, *President.*
[TRIBAL SEAL] By ——— ———, *Secretary.*
The Department of Revenue of
the State of South Dakota,
[DEPARTMENT SEAL] By ——— ———, *Secretary of Revenue.*

Tax Collection Agreement

This Agreement, date ————————————, by and between the Department of Revenue of the State of South Dakota (the "State") and the Oglala Sioux Tribe of the Pine Ridge Indian Reservation (the "Tribe"), an Indian tribe organized under the Federal Indian Reorganization Act:

Whereas, The Oglala Sioux Tribe has jurisdiction to tax sales by Indians and sales by non-Indians to Indians within the limits of the Pine Ridge Indian Reservation and

Whereas, The State of South Dakota has jurisdiction to tax sales by non-Indians to non-Indians within the limits of the Pine Ridge Indian Reservation,

Now therefore, in order to implement effectively their respective tax jurisdictions and derive there from significant revenues to be expanded for public purposes and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto mutually agree as follows:

1. Collection of Tribal Retail Sales, Services and Use Tax.—The State hereby agrees to collect on behalf of the Tribe the various taxes imposed by the Oglala Sioux Tribal Retail Sales, Service and Use Tax Ordinance (the "Ordinance") and to issue the permits provided for in the Ordinance.

2 Remittance of Tax Proceeds.—The State agrees to remit to the Tribe on a quarterly basis an amount equal to —% of the total proceeds collected by the State with respect to the preceding quarter of the taxes imposed by the Ordinance and (with respect to taxable transactions within the Pine Ridge Indian Reservation) the tax imposed by the South Dakota Retail Occupational, Sales and Service Tax Act and the South Dakota Use Tax Act. The State may retain out of its quarterly remittances to the Tribe a total annual amount not in excess of two and one half percent of the total annual proceeds of the taxes imposed by the Ordinance. Remittances shall be by certified check, payable to the order of the President and the Treasurer of the Tribe.

3. Term.—This Agreement shall become effective on ——————, shall be for a term of one year and shall terminate upon the receipt of the fourth quarterly remittance from the State as provided for herein, unless sooner renewed at the election of the State and the Tribe upon terms and conditions as shall be mutually agreed, or unless terminated sooner by either of the parties upon thirty days notice in writing to the other party. In the event of termination by the State prior to the expiration of one year without the consent of the Tribe, the State shall be obligated to remit the full quarterly remittance provided for herein with respect to the quarter during which notice is given, which obligation shall survive the termination of this Agreement.

In witness whereof, the State and the Tribe have caused this Agreement to be executed and delivered by their respective officers thereunto duly authorized.

The Department of Revenue of
the State of South Dakota.
By ——— ———,
Commissioner of Revenue.
The Oglala Sioux Tribe of the
Pine Ridge Reservation,
By ——— ———,
President, Oglala Sioux Tribe.
[TRIBAL SEAL] By ——— ———,
Secretary, Oglala Sioux Tribe.

OGLALA SIOUX TRIBE RETAIL SALES, SERVICE AND USE TAX ORDINANCE

Section 1. *Definition of terms.* The following words, terms and phrases, when used in this Ordinance, have the meanings described to them in this section:

(1) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect:

(2) "Commissioner of Revenue" and "Department of Revenue" mean the Commissioner of Revenue of the State of South Dakota and the Department of Revenue of the State of South Dakota, respectively:

(3) "Gross receipts" means the amount received in money, credits, property, or other monies worth in consideration of sales at retail within this state, without any deduction on account of the cost of the property sold, the cost of materials used, the cost of labor or services purchased, amounts paid for interest or discounts, or any other expenses whatsoever, nor shall any deduction be allowed for losses Discounts for any purpose allowed and taken on sales shall not be included as gross receipts Nor shall the sale price of property returned by customers when the full sale price thereof is refunded either in cash or by credit. On all sales of retailers, valued in money, when such sales are made under conditional sales contract, or under other forms of sale wherein the payment of the principal sum thereunder be extended over a period longer than sixty days from the date of sale thereof that only such portion of the sale amount thereof shall be accounted.
For the purpose of imposition of tax imposed by this ordinance, as has actually been received in cash by the retailer during such quarterly period as defined herein:

(4) "Indian" means an individual who is a member, either enrolled or eligible for enrollment, of any Indian tribe recognized by the United States or an organization composed exclusively thereof and organized under the Constitution and Ordinances of the Oglala Sioux Tribe:

(5) "Non-Indian" means any person other than an Indian:

(6) "Person" includes any individual, firm co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, business trust, receiver, or any group or combination acting as a unit, and the plural as well as the singular in number:

(7) "Pine Ridge Indian Reservation" includes all lands within the exterior boundaries of the Pine Ridge Reservation established by the Act of March 2, 1839, 25 Stat. 888, including fee patented lands, roads, bridges, waters and lands used for U.S. Government purposes, other than the area described in the Act of May 27, 1910, 36 Stat. 440, provided that such exclusion shall be exclusively for the purposes of this Ordinance and shall not be applicable for any other purpose nor construed to waive or to deprive the Oglala Sioux Tribe of any rights or benefits under the Act of March 1, 1889 25 Stat. 888, or otherwise:

(8) "Relief Agency" means the State of South Dakota, any county, city and county, or district thereof, the Oglala Sioux Tribe or any governmental agency thereof, or any agency engaged in actual relief work:

(9) "Retail Sale" or "Sale at retail" means the sale of tangible personal property to the consumer or user thereof, or to any person for any purpose other than for resale; the sale of natural or artificial gas, electric energy, water and communication service to consumers or users; and the sale of tickets or admissions to places of amusement or athletic contests.

(10) "Retails" includes every person engaged in the business of selling tangible goods, wares, or merchandise at retail, or furnishing of gas, electricity, water, and communication service, and tickets or admissions to places of amusement and athletic events as provided in this Ordinance, who engages therein at a place of business within the Pine Ridge Indian Reservation. "Retailer" also includes every person subject to the tax imposed by Section 4 and Section 5. The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as engaging in the business of selling such tangible personal property at retail does not constitute such person a retailer.

(11) "Sale" means any transfer, exchanges, or barter, conditional or otherwise, in any manner or by any means whatsoever for a consideration.

(12) "Treasurer" means the duly elected and acting Treasurer of the Oglala Sioux Tribe.

Section 2. *Tax on sale of tangible personal property.* There is hereby imposed as a tax upon the privilege of engaging in business as a retailer, a tax of four percent upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise, except as taxed by Section 3 and except as otherwise provided in this Ordinance, sold at retail in the Pine Ridge Indian Reservation (a) by Indian retailers to any consumers or users or (b) by non-Indian retailers to Indian consumers or users.

Section 3. *Tax on sale of farm machinery and irrigation equipment.* There is hereby imposed a tax of two percent on the gross receipts from the sale of or resale of farm machinery or irrigation equipment used exclusively for agricultural purposes (a) by Indian retailers licensed by the Oglala Sioux Tribe or (b) by non-Indian retailers licensed by the Oglala Sioux Tribe with respect to sales to Indians; provided, however, that whenever any trade-in or exchange of used farm machinery is involved in the transaction, the tax shall only be due and collected on the cash difference.

Section 4. *Tax on receipts from professional and business services.* There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property in this state upon the gross receipts of (a) any Indian from the engaging or continuing in the practice of any professional or of any business within the Pine Ridge Reservation in which the service which is rendered is a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer, and of (b) any non-Indian from the engaging or continuing in the practice of any profession or of any business within the Pine Ridge Indian Reservation with respect only to the gross receipts from services rendered to Indians, except it shall not apply to those persons engaged in the practice of the healing arts and veterinarians as the same are defined in the laws of the state of South Dakota and who are licensed by an examining board under the laws of the State of South Dakota.

Section 5. *Tax on receipts from specific enumerated services.* There is hereby imposed a tax at the same rate as that imposed upon sales of tangible personal property by Section 2 upon the gross receipts from engaging or continuing in any of the following businesses or services within the Pine Ridge Indian Reservation (a) of any Indian and (b) of any non-Indian with respect to sales or services to Indians; abstracters, accountants, architects, barbers, beauty shops, blacksmith shops, car washing, dry cleaning, dyeing, exterminators, garage and service stations, garment alteration, cleaning and pressing, janitorial services, laundry, linen and towel supply, photography, photo developing and enlarging, tire recapping, welding and all repair services, provided, however, that the specific enumeration of businesses and professions made in this section is not intended to, in any way, limit the scope and effect of Section 4.

Section 5.1 *Coin operated washers and dryers—license.* There is hereby imposed an annual license fee of five dollars for each coin operated washer and dryer in the Pine Ridge Indian Reservation, provided, however, that in municipalities the license fee for each coin operated washer and dryer owned and operated by a non-Indian shall be three dollars. The license fee shall be in lieu of any sales or gross receipts taxes from the operation or ownership of coin operated washers and dryers. Any Indian who shall violate the provisions of this section shall be deemed guilty of an offense and upon conviction thereof shall be fined not more than five hundred dollars or imprisoned for a period of not more than six months, or both. The license fees provided for herein shall be paid to the Commissioner of Revenue.

Section 6. *Tax on utility and communication services.* There is hereby imposed a tax of three percent upon the gross receipts from lass, furnishing, or service of gas, electricity, water and communication service, including the gross receipts from such sales by any municipal corporation furnishing gas, electricity and communication service to the public in its proprietary capacity, except as otherwise provided in this Ordinance, when sold at retail from a place of business within the Pine Ridge Indian Reservation to (a) by Indians to any consumer or user or (b) by non-Indians to Indian consumers or users.

Section 7. *Tax on room rentals to transient guests.* There is hereby imposed a tax of three percent upon the gross receipts from room rentals received from transcient guests of lodging establishments within the Pine Ridge Indian Reservation owned by Indians and of (a) room rentals received from Indian transient guests of lodging establishments within the Pine Ridge Indian Reservation owned by non-Indians. Lodging establishment shall mean building, structure, property, and premise kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are furnished in two or more rental units to transient guests. Transient guest shall be any person who resides in a lodging establishment less than twenty eight consecutive days.

Section 8. *Tax on amusements and other athletic events—Records of income from amusement devices.* There is hereby imposed a tax of three percent upon the gross receipts from all sales to Indians of tickets or admissions to places of amusement and athletic events within the Pine Ridge Indian Reservation and of all such sales by Indians, except as otherwise provided in this Ordinance, and upon the gross receipts derived by Indian operators from the operation of pinball machines and other mechanical devices for amusement for which a charge is made for the operation thereof, mechanical phonographs, shooting galleries, bowling alleys, pool and billiard tables and upon such gross receipts derived by non-Indian operators from Indian customers. In case the operator is the leasee of the devices referred to in the last preceeding sentence, such leasee shall be deemed the owner thereof for the purposes of this section. The operator of the machines above described shall keep a record of the gross income derived from each of said machines and shall report the same to the Department of Revenue at the same time other sales tax reports are due upon forms prescribed by the Commissioner of Revenue.

Section 9. *Use Tax.* There is hereby imposed on excise tax at the same rate as the tax imposed by Section 2 on the privilege of the use, storage and consumption within the Pine Ridge Reservation of tangible personal property purchased for use by Indians or used, stored and consumed by Indians or purchased within the Pine Ridge Indian Reservation from Indians for use within the Pine Ridge Reservation from and after the effective date of this Ordinance. The tax imposed by this section shall be interpreted and construed in the same manner as the South Dakota Use Tax Act, as amended, and regulations of the Department of Revenue issued thereunder, and this shall be considered a similar tax except that it shall apply only to use, storage and consumption by Indians or to purchase from Indians for use, storage or consumption.

Section 10. *Constitutional and statutors exemptions from taxation.* There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it, the gross receipts from sales of tangible personal property which the Oglala Sioux Tribe is prohibited from taxing under the Constitution and Bylaws of the Tribe or under the Constitution or laws of the United States.

Section 11. *Exemptions of certain sales.* There are hereby specifically exempted from the provisions of this Ordinance and from the computation of the amount of tax imposed by it. The gross receipts from sales to the Oglala Sioux Tribe, to the United States, to the State of South Dakota, or to public or municipal corporations in the State of South Dakota or any relief agency and the gross receipts from sales exempted from tax by the South Dakota Retail and Occupational Sales and Service Act, SDCL 1967, 10-45-12, 10-45-13, 10-45-14, 10-45-15, 10-45-16, 10-45-17, 10-45-18, 10-45-19 and 10-45-20, as amended.

Section 12. *Tax additional to other occupation and privilege taxes.* The taxes imposed under this Ordinance shall be in addition to all other occupation or privilege taxes imposed by the Oglala Sioux Tribe, unless otherwise specifically exempted by this Ordinance.

Section 13. *Addition of tax to price of sale or service. Absorption of price by Retailer not to be advertised.* Retailers may add the tax imposed under this Ordinance, as provided by law and where no provision is made, the average equivalent may be added. Any person whose services are taxed in Section 4 or Section 5 may add the tax under said sections, or the average equivalent thereof, to his price or charge. It shall be unlawful for any retailer to advertise or hold out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Ordinance will be assumed or absorbed by the retailer or that it will not be considered as an element in the price to the consumer, or if added, that it, or any part thereof, will be refunded.

Section 14. *Schedule for collection of tax from customer.* The following schedule is hereby adopted as the basis for collection of the tax imposed by this Ordinance from the Public where the same is applicable:

$.01 to $.12	None	$1.13 to $1.137	$.05
.13 to .37	.01	1.38 to 1.62	.06
.38 to .62	.02	1.63 to 1.87	.07
.63 to .87	.03	1.88 to 2.12	.98
.88 to 1.12	.04		

and on each additional dollar or fraction thereof an increment in tax according to this schedule.

The rate prescribed herein shall be applicable to all excise registration, or use taxes whose rate is fixed to or determined by the rate prescribed in Section 2 of this Ordinance.

Section 15. *Application for retailer permit.* Every retailer engaging in a business within the Pine Ridge Indian Reservation whose receipts are subject to tax under this Ordinance shall file with the Department of Revenue an application for a permit or permits, and shall file a duplicate original thereof with the Treasurer. Every application for such a permit shall be made upon a form approved by the Oglala Sioux Tribal Executive Committee and shall set forth the name under which the applicant transacts business, the location of his place or places of business, and such other information as the Executive Committee may require. The application shall be signed by the owner, if a natural person; in the case of an association or partnership by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. At the time of making such application, the applicant shall pay to the Commissioner of Revenue of South Dakota a permit fee of fifty cents for each permit and the applicant must have a permit for each place of business.

Section 16. *Display of retailer permit.* A permit issued by the Commissioner of Revenue pursuant to this Ordinance shall at all times be conspicuously displayed at each place of business within the Pine Ridge Reservation whose receipts are subject to tax under this Ordinance.

Section 17. *Quarterly return and remittance.* On or before the fifteenth day of the month following each quarter of the year, or at such other times as the Commissioner of Revenue may require or permit, every person who is subject to tax under this Ordinance shall make a return and remittance to the Department of Revenue on forms prescribed and furnished by the Department.

Section 18. *Deduction allowed for sales refunds.* Refunds made by a retailer during the reporting period shall be allowed as a deduction in case the retailer included the receipts, for which a refund is made, in the net taxable sales or has previously paid the sales tax.

Section 19. *Credit for taxes paid on worthless accounts. Tax paid if account collected.* Taxes paid on gross receipts represented by accounts found to be worthless and actually charged off for income tax purposes, may be credited upon a subsequent payment of the tax herein provided; if such accounts are thereafter collected by the retailer, a tax shall be paid upon the amount so collected.

Section 20. *Civil action for tax and penalty.* In any case of failure of any taxpayer to pay the tax or penalty when due, the amount of such tax penalty may be recovered in a civil action of debt, and the Oglala Sioux Tribal Executive Committee is hereby authorized to bring such an action on behalf of the Tribe in the Tribal Court against any such taxpayer who is subject to the jurisdiction of the Tribal Court and in any court of competent jurisdiction against any other such taxpayer.

Section 21. *Termination of lease.* The Oglala Sioux Tribal Executive Committee is hereby authorized to terminate upon fifteen days notice any lease or other agreement between the Oglala Sioux Tribe and any person who fails to pay the tax or penalty when due and any such person shall also be subject to the additional penalties provided for in Section 113 of the revised Code of the Oglala Sioux Tribe.

Section 22. *Lien of tax and penalty.* Any tax or penalty due from an Indian taxpayer shall be a lien in favor of the Oglala Sioux Tribe upon all property or rights to property whether real or personal, belonging to the taxpayer and upon any funds held to the credit of the taxpayer by the Bureau of Indian Affairs. In order to preserve the lien against subsequent mortgages, purchasers or judgment creditors for value and without notice of the lien the Treasurer may file with the Oglala Sioux Tribal Court and with the Superintendent of the Pine Ridge Indian Agency a notice of said lien in such form as he shall elect. The Clerk of the Oglala Sioux Tribal Court shall prepare and keep a register of such liens, including the name of each Indian taxpayer, date of notice and time received, amount, and when satisfied. A duplicate register shall be maintained at the Pine Ridge Indian Agency.

Section 23. *Enforcement of Lien.* After notice of lien has been filed as provided in Section 21, the Treasurer may apply to the Oglala Sioux Tribal Court for a distress warrant which may direct the Oglala Sioux Tribal Police to collect the tax by seizure and sale of personal property of the taxpayer in accordance with the procedures provided for by the laws of the State of South Dakota. The tax so collected shall be remitted to the Treasurer but the Oglala Sioux Tribal Police shall be permitted to collect from the taxpayer and retain the compensation allowed under the laws of South Dakota prescribing the compensation of sheriffs for distress warrant procedure. After such notice is filed, the Treasurer is also authorized to apply to the Bureau of Indian Affairs for the payment of the amount due, or such lesser amount, as may be held to the credit of such party by the Bureau of Indian Affairs.

Section 24. *Satisfaction of Lien.* Upon payment of the tax and penalty, the Treasurer shall file forthwith with the Oglala Sioux Tribal Court and the Superintendent, Pine Ridge Indian Agency, a satisfaction which shall be filed and recorded on the duplicate registers provided for in Section 21.

Section 25. *Preservation of Records.* Every person subject to tax under this Ordinance shall maintain the books and records required under the Retail Sales and Service Tax Act of the State of South Dakota, subject to all the terms and conditions specified therein.

Section 26. *Penalty.* Any person subject to tax under this Ordinance who fails to pay the tax when due shall be subject to a penalty of ten percent for the first year or part whereof and six percent for each additional year or part thereof.

Section 27. *Violation of Ordinance.* Any person subject to the jurisdiction of the Oglala Sioux Tribal Court who fails to comply with any of the provisions of this Ordinance shall be guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed thirty days or to pay a fine not to exceed one Hundred dollars, or both, with costs.

Section 28. *Disposition of proceeds of tax.* All taxes and license fees received by the Oglala Sioux Tribe from the Department of Revenue or otherwise as provided in this Ordinance shall be deposited in the general fund of the Oglala Sioux Tribe and shall be expended only as the Oglala Sioux Tribal Council may direct.

Section 29. *Overpayments.* If it shall appear subsequent to the receipt of tax proceeds by the Tribe that an amount of tax penalty or interest has been paid which was not due under the provisions of this Ordinance, whether as a result of a mistake of fact or of law, then such amount shall be credited against any tax due, or to become due, under this Ordinance from the person who made the overpayment, or such amount shall be refunded to such person by the Oglala Sioux Tribal Executive Committee, provided that a claim for refund shall be filed with the Treasurer within three years of the collection of the overpayment by the Department of Revenue or said claim shall be forever barred.

Section 30. *Agreement with the State of South Dakota.* The Oglala Sioux Tribal Executive Committee is hereby authorized to enter into an agreement with the State of South Dakota to provide for the collection of the tax provided for herein. Such agreement may provide for the retention by the State of South Dakota of a collected tax annually and may provide that a fixed percentage of the total annual tax proceeds collected by the Department of Revenue from the Pine Ridge Indian Reservation pursuant to this Ordinance and pursuant to the South Dakota Retail Occupational Sales and Service Tax Act and the South Dakota Use Tax Act shall be paid to the Tribe of the exact amount of the tax imposed by this Ordinance. The initial term of the agreement shall be for one year, subject by renewal at the election of the State of South Dakota and the Oglala Sioux Tribal Council.

CERTIFICATION

I, the undersigned as Secretary of the Oglala Sioux Tribe, hereby certify that the Oglala Sioux Tribal Council is composed of 19 voting members of whom 15 members, constituting a quorum, were present at the regular session duly called and held on July 30, 1970, at Pine Ridge, South Dakota; that the foregoing Ordinance was therefore adopted by an affirmative vote of 14 for; 0 against; 1 not voting; that said Ordinance is in full force and effect unless by legal enactment of the Council it shall be amended or rescinded.

SECRETARY OF OGLALA SIOUX TRIBE.

Attest:
Oglala Sioux Tribe

APPENDIX XVI

BUREAU OF INDIAN AFFAIRS SUPPORT FOR THE FUNCTIONS OF TRIBAL GOVERNMENT—CASE STUDY OF PINE RIDGE RESERVATION

The following report is an historical examination of the relationship between the Tribal Government Operations of the Bureau of Indian Affairs and tribal government. It is the judgment of the Trial Government Task Force that a case study will provide a clear historical perspective of the role the Tribal Government Operations assumes in tribal government development. After examining forty years of communication between the Bureau and the Zuni, Cheyenne River Sioux and Oglala Sioux Tribal Governments, the Task Force believes that the communications between the Oglala Sioux Tribe typically illustrates the requests and responses which have shaped IRA tribal governments since the passing of the Indian Reorganization Act of 1934. The Deputy Assistant Secretary of the Bureau of Indian Affairs, too, noted that "Pine Ridge is both unique and typical. Many of the underlying causes (of government problems) are all too typical of too many Indian reservations." [1]

Tribal self-government is the Indian's historical and inherent right to govern their internal affairs due to their sovereign authority—an authority which has consistently been substantiated by the United States Court.[2] While tribal authority has been defined and limited by acts of Congress, the bureaucratic requirements of uniformity imposed by the Bureau of Indian Affairs have undercut the powers of tribal government and reduced them, often, to a state of paralysis.

One of the most inhibiting of the uniform requirements is the authority of Secretarial approval written into the IRA constitutions.

Authority for Secretarial approval of tribal ordinances is designated in the Indian Reorganization Act constitutions (IRA).[3] A typical example is the constitution of the Oglala Sioux of the Pine Ridge Reservation in South Dakota, which provides that the tribal council shall exercise, *subject to review or approval by the Secretary of the Interior*, the following powers:

> To appropriate for public purposes of the tribe any available tribal council funds.
>
> To levy taxes upon members of the Oglala Sioux Tribe and to levy taxes or license fees upon non-members doing business within the reservation.
>
> To exclude from the restricted lands of the Pine Ridge Reservation persons not legally entitled to reside therein.
>
> To promulgate and enforce ordinances governing the conduct of members of the Oglala Sioux Tribe, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers.
>
> To purchase under condemnation proceedings in courts of competent jurisdiction, land or other property needed for public purposes.
>
> To protect and preserve the property, wildlife, and natural resources, gases, oils, and other minerals, etc.—of the tribes, and to regulate the conduct of trade and the use and disposition of property on the reservation.
>
> To regulate the inheritance of property, real and personal, other than allotted lands, within the territory of the Pine Ridge Reservation.
>
> To provide for the appointment of guardians for minors and mental incompetents.[4]

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[1] Special Report from the Deputy Assistant Secretary to the Secretary. Re: Pine Ridge, June 24, 1975.

[2] Cohen, Felix S., Handbook of Federal Indian Law. University of New Mexico Press, Albuquerque, New Mexico 1942. "The Scope of Tribal Self-government."

[3] Indian Reorganization Act (Wheeler-Howard Bill), 1934.

[4] Constitution and By-Laws of the Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota. Article IV, (Approved January 15, 1936).

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For tribes with IRA constitutions, if endorsement of the Secretary is not obtained, an ordinance, resolution or amendment is unenforceable. Moreover, in cases where an ordinance is not approved by the Secretary, the tribe has no authority to appeal the Secretary's decision. It is this general approval power of the Secretary and the surrogate approval power of the Superintendent and Field Officers which both intentionally and unintentionally frustrates, undermines and destroys the possibility of responsible tribal government. The body of this report shall document specific circumstances.

To understand the development of the tribal constitutional inhibitor, we must examine the historical reason behind the inclusion of the approval power in the tribal constitutions enacted by the Indian Reorganization Act of 1934. It is the judgment of this Task Force that the history and reason for its inclusion in the sample IRA constitutions exemplifies the paternalism and lack of trust which permeates and perpetuates a dependent relationship of tribal governments: A BIA-controlled relationship which will not recognize the fact that Indian nations are capable of governing themselves. Commissioner Philleo Nash believed that the purpose for creation of the IRA constitutions was to develop transitional governments amongst the tribes, which would one day both emulate and be absorbed by the bureaucracies of the United States government. Nash said:

"We think that the responsibility of the Federal government is to work with them (tribal government), to aid them toward the evolution of a form of local government which is compatible with and is a part of our governmental system. At the present time they are partly in and partly out. It is in this sense that they are transitional governments." [5]

And, it is in this sense that the policy of molding and shaping Indian nations through their tribal government to fit into the demands of an unrelenting, self-preserving bureaucracy is continued.

INDIAN REORGANIZATION ACT IN CONTEXTUAL TRIBAL HISTORY

Because current Indian policy is generally a reaction to the era which preceded it, a brief historical description of the Sioux Nation will place the era of the IRA constitution in a more clear political perspective. The following historical description is abstracted from testimony at the 1976 Aberdeen Hearings of the American Indian Policy Review Commission on Tribal Government:

This land we called ours all belonged to the Sioux. Here the Indians lived as free as men had ever lived bound only by the earth and sky. Roaming herds of buffalo and elk were sacred animals providing everything the Indian needed; food, shelter and clothing, but an explosion rocked the Sioux Nation in 1848.

On the banks of Sutter Creek in California, gold was discovered. The spring of 1849 saw the greatest mass movement of human beings in American history. The California gold rush—a quarter of a million people—moved across Indian territory, slaughtering the game as they went. In 1851 Congress authorized treaties with Indian tribes as land was being crossed. Ten thousand Indians from all the Plains tribes met in Wyoming and accepted the terms of the Treaty of Fort Laramie. It gave the government the right to establish roads over Indian territory and promised Indians a payment of $50,000 a year for fifty years. It settled all complaints for the destruction of buffalo with trinkets and beads. The treaty also laid out the boundary of the lands which we recognize as belonging to each side involved. The lands of the Sioux extended from the Missouri to the Big Horn.

During the ten years that followed, the Sioux fully observed the terms of the treaty but then, in 1861, gold was discovered in Montana. The flow of gold seekers turned to the north to the heart of the buffalo country, and little bands without organization, young warriors, began to attack them. The U.S. Army moved into the Hautal River area and pushed farther for the benefit of the Montana gold seekers. This was more than the Sioux could endure. Red Cloud beseized the forts. War. Then those who favored peace came into power in Washington and another treaty was drawn up at Fort Laramie in 1868. The Indians promised to stop fighting. The U.S. Government agreed to keep all people out of the Sioux territory except government agents. Land west of the Missouri was not ceded to the United States Government by the Sioux. The treaty stated that no part of the reservation could be sold or given up without the written consent of three-fourths of the adult Sioux men. This and all other treaties recognized the right of the Sioux men to continue governing their own people. Most of the non-Sioux tribes signed immediately but Red Cloud would not sign for his tribe until the forts were actually abandoned. When the U.S. Army withdrew, Red Cloud moved in and burned every building. Then he went to Laramie and signed the treaty. He believed that the Indians could keep their land. But seven years later, it happened again. Gold was discovered in the Black Hills and another gold rush was on. Miners stampeded the Black Hills without legal right. This time not over, but directly into Sioux country to stay. Eleven thousand settlers poured in during the first two months of 1876. Contrary to the U.S. Government promise, the Army did not protect the Sioux Nation against these settlers. In a number of instances, they protected the gold seekers. Protests by the Indians fell on deaf ears. Congress did authorize the commission to negotiate with the Sioux for the rental of the Black Hills for mining purposes only. The Sioux weren't interested in renting or selling. They simply wanted the intruders to leave their Black Hills. The Great Council broke up with no agreement reached. The U.S. public rose in protest. The U.S. Congress denounced the Sioux Nation on the floor of the House and Senate. The U.S. Government demanded the Black Hills gold fields, treaty or no treaty. The Sioux undertook to protect their homes, to do for themselves what the government had promised to do under the treaty.

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[5] Archives: Bureau of Indian Affairs. Philleo Nash on IRA Constitutions.

The United States War Department began immediate preparation to conquer the Sioux. A three-prong push movement was set up under Generals Crook, Terry and Gibbons. General Custer and his Seventh Cavalry were part of Terry's command. The Sioux under Chief Crazy Horse stood off General Crook. They wiped out General Custer at the Little Big Horn. Now the U.S. Government demanded the Sioux to be crushed. Now the U.S. Government insisted on simply taking the Black Hills.

In 1877, Congress passed the Indian Appropriation Act which made a slight change in the western boundary of the permanent reservation. This Act simply took the seven and one-half million acres of the Black Hills from the Sioux as well as twenty-two million acres outside the Black Hills. By 1880, Feldtrap had driven the Sioux back to the remaining reservation. The buffalo were gone. The Sioux were now utterly dependent on the government which kept them in line by a simple method. Submit or starve. Cutting off Sioux rations was authorized by acts of Congress. The Sioux were forced to eat their horses and dogs, but still less than ten percent of the Sioux would sign the paper that would give up the Black Hills.

In the late 1880's the State of South Dakota was to be formed. The Great Sioux Reservation stood as a barrier between the white settlements on the east and west. The U.S. government thought a wide strip should connect the two portions of South Dakota as well as provide easy access to the Black Hills. By again using the method of submit or starve, the U.S. got it; another nine-million acres were declared surplus and opened to non-Indian settlement. The Sioux could do nothing. In their despair the Sioux were ripe for the visions of a prophet who said a Messiah would come with the ghost of their deeds to drive the white man out and bring back the game. The U.S. government decided to stop this religion if it took the whole army. Sitting Bull was killed.

The Seventh Cavalry, Custer's old outfit, was ordered to Pine Ridge to stop any Indian movement. Big Foot's stand on the Cheyenne, two months earlier, felled the Tiny Ridge. The U.S. cavalry overtook the Indians seventeen miles short of safety on a creek called Wounded Knee. While army machineguns spun on the Sioux from three sides, the Sioux laid down their rifles in a pile on the ground. A medicine man threw a handful of dust in the air as a gesture of defiance. No one knows who fired the first shot, but within two minutes it was all over. Most of the Sioux men died where they sat. Five miles down the creek, the U.S. Army pursued, and shot down women and children. Mercifully, a South Dakota blizzard moved in to silence the wounded and helpless. After several days, the cavalry returned to Wounded Knee. Three hundred men, women and children laid dead. Big Foot was frozen where he sat. The rigid bodies were loaded on wagons and buried together in one large pit. After this so-called battle of Wounded Knee, the Sioux were crushed. If tribal resentment existed, the U.S. government blamed it on the Sioux leaders. The U.S. government removed the great chiefs from their positions in the tribes and appointed men who would do as told. The U.S. government was determined to make farmers of the Sioux.

In 1907, the government issued every family one of their plows and told the Sioux to dig in. The allotment broke up the reservation into individual tracts and decided that there was more land than the Sioux needed. The "surplus" was opened to non-Indian homesteading. The reservation changed again. During the depression years, the farms dried up and the Sioux were hungry again.

In 1934, however, the U.S. government ostensibly reversed its policy of termination to allow the Sioux their own self-government. But history doesn't change the memories of people so easily. During this period the U.S. government created national works projects for the Indians but Pearl Harbor cut the program short. Public funds were required for war purposes and the Sioux were told to leave the reservation and find work somewhere else. To survive, large numbers of Sioux did leave.[6]

Those who remained would attempt to redefine their legacy under the Indian Reorganization Act—known as the "Indian New Deal".

INDIAN REORGANIZATION ACT OF 1934

The Indian Reorganization Act (IRA) was a Congressional attempt to shift its policy from termination and assimilation to one supportive of tribal government. While the IRA was regarded by many as a reversal in U.S. government policy of extinction of Indian sovereignty, the facts are that only the venue of termination was altered. But the Act sounded hopeful:

> An Act—to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule; and for other purposes.[7]

As Indian Affairs had been moved from the War Department to the Department of the Interior, the Act was hopelessly tied to the burgeoning BIA bureaucracy. According to Carlos Embry in his book, *America's Concentration Camps*, the "IRA serves to keep the Indian in virtual slavery to Uncle Sam . . . and subservient to the Secretary of the Interior."[8]

The bureaucratic entanglements for tribes with the Secretarial approval provision in their constitutions are all too evident: If a tribal council wishes to pass an ordinance, the council must keep a careful record in its minutes. One or more copies of the minutes must be retained by the tribe for its permanent record; then one or more copies must be made for the BIA agency Superintendent, one or more copies for the BIA area office and at least six copies for the Washington office. Then the minutes must be indexed so that anyone examining them may see at a glance what questions were discussed and what actions taken.

But these minutes serve only to provide information to the Department of the Interior. Official action will not be taken by the Washington office, or the Department on any resolution, ordinance of request. The tribal governing body must submit a separate document embodying its ordinance or resolution to the Superintendent who often is limited to a set time that he must respond or the resolution is negated. Ordinances requiring Secretarial approval often take tremendous amounts of time which slow down the governing machinery.

Tribal councils, in preparing the ordinances and other matters to be presented to the Department are further instructed to comply with the specific language which is to appear at the head of an ordinance or resolution; to see that it contains a citation showing the specific provision in the constitution or charter authorizing the action; to see that it is signed by the appropriate tribal officials, certifying the action and the vote; to see that it bears the Superintendent's endorsement and if he endorses it, the date of the endorsement. The document must be accompanied by a letter containing the Superintendent's comments and recommendations. A copy is then forwarded to the area director who adds his remarks and suggestions and then forwards it to the Commissioner in Washington.[9]

What kind of self-government is this? Government processes which come from the people are understood by the people. But in Indian self-government, the operations and terms are so complex that expensive attorneys are required to interpret the Indian's "own" law. The forms and formulas are made to fit into the processes of the Bureau of Indian Affairs. It is process which is apparently designed to support jobs for the bureaucrats rather than to promote the self-government of tribal nations.

A frustrated member of the Rosebud Sioux Reservation, also an attorney, wrote of the problems of bureaucracy in 1951:

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[6] Aberdeen Hearings of the American Indian Policy Review Commission, 1976.

[7] Indian Reorganization Act of 1934: Purpose section.

[8] Embry, Carlos; America's Concentration Camps. "Indian New Deal A Fair Deal?" David McKay Comp. Inc., New York 1972, pp. 195–209.

[9] Discussions with Tribal Government Organization at the Bureau and Embry (supra).

> It has always been my ambition to work for my people. In December of 1950, I negotiated contracts with the Rosebud and Crow Creek Sioux Tribes. To date, the contracts have not been approved by an arrogant BIA Commissioner who does not like my associates on the contracts. (The Commissioner) . . . has been unsuccessfully trying to coerce the tribes into repudiating the contracts, because he knows there is nothing upon which he can base disapproval. Approval is delayed even though the Crow Creek Indians are badly in need of attorney representation. Their lands will be flooded in two years by the Missouri River Development. The Sioux Indian in South Dakota is the victim and prisoner, economically, socially, and otherwise, of one of the most vicious bureaucracies, so insidious is its self-sustaining nature.
>
> My considered opinion is that as long as we remain under the paternal enslavement of the Indian Bureau there will be little or no advancement except in the official pay envelopes. My idea is that the Indian Bureau should be abolished totally and absolutely.[10]

AN ARCHIVES SEARCH OF THE BUREAU OF INDIAN AFFAIRS TRIBAL GOVERNMENT OPERATIONS RELATIONSHIP TO THE OGLALA SIOUX TRIBE AT PINE RIDGE

Ivan Drift, an Oglala Sioux, described his tribe's conversion to dominant culture bureaucracy in a 1943 report to the Bureau of Indian Affairs:

> Lakota, Dakota, Nakota: meaning friends, allies.
>
> Nadowe: Supposed to be Algonkin (Ojibway) nickname for enemies and snakes.
>
> Nadowesewig: Said to be old Ojibway nickname for Dakota and meaning little enemies or little snakes.
>
> Nadowesioux: Early Frenchmen corruption and spelling to pluralize word.
>
> Sioux: American abbreviation.
>
> Soo: American's mispronunciation of an abbreviation of a corruption of a nickname of Indian sarcasm meaning the opposite of Dakota or Enemies.
>
> Lakota has a meaning, Sioux means nothing. Pine Ridge is considered to be the least progressive and most Indian of all the Sioux. Rather it is the least progressive, but probably the least Indian but becoming the most Sioux." [11]

TRIBAL GOVERNMENT HISTORY AT PINE RIDGE: BUREAUCRACY TO CREATE A TRIBE IN ITS OWN IMAGE

New Dealers vs. Old Dealers:

Government policy changed often during the early reservation period. Chiefs were denounced, deposed, reinstated, given special considerations and privileges.[12] The point was to weld the tribe into submission to the higher authority of the Bureau of Indian Affairs. Indian Officer McGillicudy, at the turn of the century "on orders from Washington that neatly fitted in with his own desires, was trying to destroy the power of the chiefs, break up the tribal organization, and gather all authority into his own hands as the United States agent. But he could not even talk to his Indians unless he requested that the chiefs call a council and even then had to talk through interpreters who were generally chosen by the chiefs." [13]

Later, however, McGillicudy had his own way. In a 1953 letter to Felix Cohen, the Pine Ridge Superintendent explained the history of law enforcement at Pine Ridge:

> The Pine Ridge police was started in 1879 when Dr. McGillicudy became agent at Pine Ridge. The police organization at that time resembled an armed and mounted constabulary. It consisted of 50 selected Oglala Sioux Indians. They were responsible to the agent and not to the tribe.

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[10] Archives: Bureau of Indian Affairs. Accession No. 57–A 18S., File 042, 1951 letter from South Dakota Attorney General.

[11] Archives: Bureau of Indian Affairs, Accession No. 56A–588, File 042, Ivan Drift: File No. 10224.

[12] Archives: Bureau of Indian Affairs 1943–1952. Accession No. 56A–588, 57A–188, 57A–188, Intra-Bureau communications.

[13] Hyde, George E.: "Red Cloud's Folk", University of Oklahoma Press, Norman, 1937. "A Sioux Chronicle," University of Oklahoma Press, Norman, 1956.

> They were paid by the government. They were in reality a bodyguard for the agent and a police force to protect the government property on the reservation. All tribal police were paid by the government until the establishment of the present police system as provided for in the so-called Ordinance 81.[14]

To counteract the divisive effects of the 1868 treaty which fractionated the Sioux Nations, a Sioux Council was established to pursue claims against the U.S. Government for the talking of the Black Hills as well as other ceded portions of the original Great Sioux Reservation. Initially, this council was consulted by BIA administrators. The administrators dubbed it the "Chief's Council." The group was composed almost entirely of older full bloods who were often sons of former band chiefs.[15]

But, with the passage of the IRA, the treaty council became known as the "Old Deal" by the Oglalas. One full blood told a BIA field officer that "we Indians don't have Democrats or Republicans, just old and new dealers. But all of us stand for the treaty." [16] Much of the tribe were old dealers. When the IRA constitution was brought before the tribe by the Bureau, the old dealer tribal members were nearly successful in blocking the vote on the proposed charter of incorporation, but once the IRA passed, no provisions were made to merge the treaty council with the new constitutional government. The Bylaws of the Oglala Sioux Tribe in Article VI, Section I provide that:

> The Tribal Council may appoint delegates to represent Oglala Sioux Tribe in national Sioux Councils.

The treaty council, however, pointedly ignored the usurpation of their function and continued to press their claim with the Sioux Nation.

The files in the archives are replete with charges made against the tribal council by the Old Dealers. The Superintendent and the Bureau of Indian Affairs' representatives stopped dealing with the Old Dealers to recognize the more enculturated New Dealers who were often elected to the council with Bureau support. The beginning of the end was evident and blood quantum was becoming a critical issue. The new dealing tribal council members were generally younger and more influenced by the white bureaucracy. It is highly significant that the Old Dealers did not abide a tribal council delegation to Washington on Sioux claims issues or other sensitive matters. Separate groups, one authorized by the tribal council and another by the treaty council, journeyed to Washington at the same time, each jockeying for the attention of the officials at the Bureau. A divisive and undermining precedent had begun: Tribal members were forced, by the very authority of the Bureau, to look to its higher status to resolve what should have been purely internal tribal matters.[17]

Current Old Dealers formed the Inter-District Council. The Council was a combination of traditionalists, Old Dealers and other Sioux members who did not desire to become enculturated in the BIA formula. Some of these Old Dealers were elected to the tribal council but generally they prefer to maintain the traditional manner of self-government. In February of 1962, the Inter-District Council met at Wounded Knee to consider the report of a tribal investigating committee authorized by the tribal council to investigate itself and its executive committee. The conclusion of the report submitted by the committee chairman detailed the mismanagement of funds, IRA in-council strife and appointments by favoritism. An Old Dealer motioned to recall the entire council body including the executive committee, and scheduled new elections. The motion was seconded and passed unanimously by the Inter-District Council.

To implement this decision in accordance with Article IX of the tribal constitution, one-third of the eligible voters were required to sign a petition. Approximately 1200 names were gathered. But the tribal council decided that the necessary signatures had not been collected and the matter was not brought to a vote. (At that time, the total population of the tribe was 8500 but census rolls for voting purposes were not taken.)[18]

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[14] Archives: Bureau of Indian Affairs (1953–1954). Accession No. 59A–643. 1953 letter to Felix Cohen.

[15] Archives: Bureau of Indian Affairs. Intra-Bureau Memoranda. Accession No. 59A–643. 055 Series.

[16] Feraca, Stephen: "The History and Development of Oglala Sioux Tribal Government," Washington Tribal Government Operations. September, 1965.

[17] Archives: Bureau of Indian Affairs. Accession No. 56A–588, 57A–18S, 59A–643, 055 Series: 1938–1954.

[18] Archives: Bureau of Indian Affairs 1962. Accession No. 69A–3351.

The Bureau had long ago set precedents of ignoring portions of the tribe to accommodate its own needs. The Bureau requested that tribal government reorganize its communities to accommodate the IRA constitution. In a letter to the Commissioner on October, 1935, the Field Agent stated that:

> If we start allocating representatives instead of having representation in each district at large we will not be able to keep away from . . . friction. But if each district were recognized it would make a tendency among other districts who have practically equal population to want the same number of representatives which would make an unwieldy council indeed.[19]

The Bureau was concerned that the tribe would not accept its form of representational government.

To weld the IRA constitution to the tribe, the BIA sent field representatives, anthropologists and other specialists to explain the provisions of the IRA to selected Indian leaders, but it was not easy.

Superintendent McGregor (January 6, 1936) wrote to the Commissioner, "I think we met more stubborn unorganized resistance here on the Pine Ridge Reservation than in any of the Sioux Countries, and it took every ounce of energy and thought we had in order to win with such false propaganda that was made against it." [20]

The BIA anthropologist said that the "constitution provided for an essentially modern form of government based on the theory that after more than several generations of intensive contact with European Institutions, the Oglala Sioux were prepared for such a government." [21] Clearly, the Bureau, with good intentions of reversing the effects of allotment, was attempting to glue on a form of government that was outside the spectrum of internal tribal affairs and then mold individuals into the required positions. Felix Cohen said that a "stable political organization must reflect a community of consciousness. Where it is not found it could not be taken very seriously by those being governed." A government which does not have final authority cannot reflect tribal "community" experience. And the closeness of the vote to accept the IRA constitution exacerbated the BIA imposed factionalism.

Less than a year after the seating of the first IRA tribal council, Superintendent Roberts wrote in a letter to the Commissioner on March 29, 1937:

> The typical person referred to as a mixed blood is well exemplified in the President of the Council. He is proud of his white attitudes. He refers to the full-blood Indians in his letters and in his speeches as ration Indians and indicated that they are non-progressive and non-intelligent. I think it is accurate to say that the full-blood pattern here would like to follow the native processes, the mixed bloods following the white pattern.[22]

Here is the precedent for acute tribal interest, particularly at election time, for the question of who is a tribal member and who is not. The terms can be understood either biologically or politically, depending upon point of view—The Wheeler-Howard Act or internal tribal government. The Federal Census in 1960 revealed that 37% of the total tribal membership consisted of biological full bloods, and 20% of the members less than one-half Indian blood. But, politically the reverse is true according to a Bureau report.

> About 70 percent of the reservation residents are (political) full bloods in terms of not accepting the form and substance of the IRA tribal government.

The LaCreek District, which has no Indian communities within its jurisdiction, according to the bureau has a disproportionate number of mixed-blood politicians including Mr. Wilson—the first Tribal Chairman under the IRA government. Contemporary Pine Ridge is similar due to the proximity of the agency which encourages economic and political dominance by more enculturated mixed bloods.

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[19] Archives: Bureau of Indian Affairs. Field Agent Letters to Commissioner, October, 1935, 055 Series, 9684–36–066.

[20] Archives: Bureau of Indian Affairs. January 6, 1936. Accession No. 9684–36–066. Series 055. Also Feraca (supra).

[21] Superintendent McGregor Letter to Commissioner. January 6, 1936. Feraca (supra).

[22] Ibid. (Feraca).

By 1945, mixed-blood politicians absorbed the pattern initiated by the Bureau. Tribal activities and programs were haunted by constant bickering in the tribal council to deal with Old Dealer threats to oust the Indian Bureau. The most vocal did not support the IRA constitution. The Superintendent wrote to the Bureau:

> Practically every leader who has any following at all, has urged me to put my influence back of the Bushfield Bill or abolish the Organization Act. They do it to get rid of this council. Furthermore, anyone who remotely knows anything about the Sioux knows that any elected officer cannot truly represent the Sioux people. Those who follow the Indian pattern have other ways of developing leadership (than the BIA model).[33]

In a second letter to the Assistant Commissioner, the Superintendent said:

> I have no doubt that if the issue were brought to a vote of the people, the whole council and the Act as well would be voted out of existence. But we should, I think, strive to preserve the gains which are definite and many. I feel I have spent too many years here, building up the council often against the urge of Indians and whites to undermine the council now, even though it has gone haywire.[34]

EARLY DAYS: IGNORING TRIBAL GOVERNMENT

In 1942 the War Department condemned 233,000 acres of Sioux trust and alienated lands for an aerial gunnery range. The Department promised to return the land and make reparations. These promises would remain a bleeding sore on the land politic for the next thirty years. The report which described the taking said:

> Indian residents are dependent upon natural resources of the area. All activities must be fitted into a workable program that harmonizes with the ultimate land use objectives of the Indians who obtain their livelihood from their own resources.

The report went on to compliment the 727 families who produced victory gardens. The tone of the report indicated that if all Sioux families would produce victory gardens, the process of "civilization" would be completed. Again speaking of victory gardens, the report said, "Indians are willing to work but must have some incentive to effort with a definite purpose in life if their rehabilitation is to be permanent."[35]

But the very taking of the land was a destruction of the economic base. The acquisition of the gunnery range increased competition for lands in the area and inflated the price of replacement sites so that the relocated individuals could not buy substitute land with their compensation. Indians were told they would be given preferential status to repurchase their lands at the end of the war. While they waited, many had to dispose of their livestock because the range land was taken.

In August of 1943, tribal government, concerned about the status of their severed land, passed a resolution to keep their land after the War Department was through with it. The Superintendent told the Tribal Council that the "resolution is immaterial since all the tribal land in the bombing range is under lease to the War Department."

Again, the Council passed a resolution: this time to execute its own wills. The Superintendent wrote that the "making of a will is not a simple matter unless the person in its preparation is a carefully trained person in legal requirements." The latter commentary is indicative of consistent judgments passed to the Tribal Council by a succession of superintendents who interpret the framework of the law to deny Tribal Government the right to govern itself.

In an attempt to return authority to itself, the 1944 Tribal Council resolved that the President and Secretary of the Tribal Council shall make all land related decisions. But the Superintendent wrote to the Assistant Commissioner of Indian Affairs that the "Council proceedings were embarrassing." Instead of responding to the land issue, the official reduced the problem to one of character. "The proceedings were a headlong attempt by a few people who dominate the council to exploit their tenure for personal power."[26] The issues which embarrassed the Superintendent were land decisions as well as: the authority of the Council to direct or remove BIA personnel; the authority of the Council to control non-Indians as well as Indians on the reservation; and the power to substitute Council decisions for Bureau regulations and policy. The superintendent wrote to the commissioner, "the Council believed it had great power to get personnel removed and replace them with Indians of the Council's selection." Worried about protecting his own authority, the superintendent would not entertain the possibility that tribal authoriy might include personnel matters.

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[33] Archives: Bureau of Indian Affairs. July, 1945: 055 Series. Accession No. 56A-588.
[34] Ibid.
[35] Archives: Bureau of Indian Affairs. 1942 Annual Report. Accession No. 56A-588.

The superintendent also labeled the Council newspaper, The Voice of the Sioux, a "prostituted news sheet." In an attempt to gag the paper, whose views did not coincide with his own, the superintendent wrote to the area director that the Voice was dangerous to the values of the Organization Act. Already he said, "there is concern (about the paper) amongst BIA employees, missionaries, traders, lessees and many Indians."[27] Disgusted with the superintendent's control, the council president requested that the superintendent be removed. Unfortunately, the president depended upon the Bureau's agreement of the superintendent's abuse of power. Unfortunate, because the Bureau automatically believed the word of an employee before a tribal member.

Later that year, the same council attempted to repeal the Indian Liquor Law. The superintendent refused to honor the resolution as law and called it "merely the expression of an opinion of the Oglala Sioux Tribal Council which therefore does not require the approval of the superintendent."[28]

OGLALA TRIBAL FRUSTRATION

In 1946, a frustrated council requested the superintendent to instruct the officers and employees of the Interior Department to abide by the Tribal Constitution. The Oglala Sioux Tribe "has been unable to enforce ordinances and other resolutions regarding the conduct of resident employees."[29]

The BIA Tribal Relations Operations Division responded by saying that the "resolution is ambiguous If instances occur where the officer does not abide, the matter should be brought to this office."

At the same meeting, the tribal government voted to remove a trader for "gross mismanagement and irregularities in conduct of trade." The superintendent told the tribe in a memo that the "resolution should have been in the form of an ordinance."[30] Again and again tribal government authority was defined by the Bureau as a funnel for its own policy. Serious efforts by tribal government to administer tribal affairs so threatened the bureaucracy that tribal government authority was reduced to that of a high school civic class.

The superintendent did not limit his attempted character diminution to tribal government. Individual tribal members, too, became objects of his subjective definitions. In 1946 he responded to a request for a patent in fee by saying that "the applicant has not worked at anything for the past several years and the issuance of a patent would not materially effect their affairs either way. They would likely spend their money for casual expenses." While the issue of maintaining tribal land as tribal land is critical, the superintendent relied on "competency" to make his unilateral decision. Again and again, tribal members who did not agree with Bureau policy were called incompetents or malcontents.[31]

To justify his disregard for tribal government involvement in land related decisions, the superintendent wrote to the area director that "the tribal council was not fully organized and therefore not available for discussion of this subject."

But, in his annual report that year, the superintendent did speak of the tribal council. "The tribal council is taking an active part in the rehabilitation program of the reservation." Not specifying of what that program was composed, one can only conjecture when numerous requests were forwarded to the superintendent from Sioux members to change their names from Brown Eyes to Brownie and White Eyes to White Eagle. Under a section labeled "Did You Know That," the report told the reader that 592 Pine Ridge families planted victory gardens and canned 101,500 quarts of fruit.[32]

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[26] Archives: Bureau of Indian Affairs. 1944 Tribal Council Minutes and Superintendent. Correspondence to Assistant Commissioner. Accession No. 56A-588. 055 Series.

[27] Archives: Bureau of Indian Affairs. 1945 Letters from Superintendent to Commissioner. Accession No. 56A-588. 055 Series.

[28] Ibid.

[29] Archives: Bureau of Indian Affairs. 1946 Tribal Council Minutes. Accession No. 56A-588. 055 Series.

[30] Ibid. (correspondence).

[31] Archives: Bureau of Indian Affairs. Issues Reverberates through the files from passage of IRA Constitution until the takeover. File No. 9684-36-066, 9684-C-36-057, 9684-B-36-057. 65022-39-055. 7963-49-035. 19025-53-055.

During the elections, law and order was a major problem on the Oglala Sioux reservation. The tribal minutes said the "setup and type of persons favored by those in power (BIA) maintains a one-sided law and order labeled Indian Law." The boiling point was reached when a deputy arrested an ex-GI and then informed the GI's friends that he had their buddy in his car and "what the hell are you going to do about it?" The tribal secretary asked, in a memorandum. "How much longer are we going to tolerate this burlesque manner of administration. It's a joke the way we pay these tribal police to snoop around and ferret out family differences and investigate complaints to collect arrest fees, mileage and money." [33]

COMPETENCY

Tribal government voted against the issuance of fee patents in 1948. The superintendent, with respect to land sales, wrote a letter to a non-Indian cattle farmer saying that Mrs. Charles Ghost Bear's land is for sale. At the same time, the superintendent wrote to the commissioner that an "Indian operator will probably buy the land." The operator wrote to Senator Bushfield to request that he be allowed to purchase the land and build a small business on it. Bushfield wrote back that he felt it a good idea since, "you've been a pretty good worker." But the superintendent suggested denial of Mrs. Ghost Bear's fee patent, presumably to hold out for the non-Indian cattleman. In a letter to the area director, the superintendent wrote that "the land owner has no experience except housewifery and she is not capable of planning anything of value to advance the living conditions of the home." The superintendent also said in his letter that he was "unable to get the view of the tribal council on such short notice." Besides, he said, her "advanced age, business inexperience and nomadic habits means she is not competent to handle the property transaction. She is neither industrious nor progressive and prefers a tent to a modern house. Therefore, the discharge of trust obligations precluded my granting Mrs. Ghost Bear the right to terminate at will the existing trust obligation."

BIA ABUSE OF AUTHORITY: CHANGING TRIBAL GOVERNMENT

Later that year, the tribal council attempted to rectify the Bureau's abuse of its authority. The council chairman requested the Secretary of the Interior to deal wih the irregularities of Bureau response to Oglala Sioux tribal legislation. The meeting at which the council directed its chairman to communicate that request was not attended by the superintendent due to heavy snows. The council also took strong initiative to maintain its tribal land base and consolidate separated lands where it could. The superintendent protested that meeting as well as the council's submission of its minutes to the Secretary and labeled both "irregular and illegal." He said, in a memo to the Commissioner, "the methods used for tribal adoption and Congressional enactment of this plan constitute treason." [34]

Forces inhibiting tribal authority continued to plague the council. In August of 1950 the 7th Judicial Court at Rapid City reversed the tribal court decision which convicted an Indian of an offense on the reservation. The opinion compared the authority of the tribal court over tribal members to the "authority of the Elks Club over its members." The area director to the Commissioner that "attacks against tribal authority are based upon the failure of Indian tribes to properly administer the form of self-government with which they were burdened without sufficient guidance and follow-up."

Tribal government was caught in a political Catch 22. On one hand the Bureau through its superintendent, area director and tribal government operations tightly controlled tribal government powers while on the other hand it chastised tribal government for not developing a smooth and functional governing body.

TRIBAL GOVERNMENT TRIES TO TALK

By 1951, tribal government attempted to flex its muscle. A delegation traveled to Washington to speak with the Assistant Commissioner. The superintendent wrote a letter to the Assistant Commissioner saying that the "Delegates presented no credentials to (this) office to indicate that they were authorized by the tribal council to discuss business on behalf of the tribe."[35] But the issues were a premonition of things to come: Law and Order ordinances and better procedural methods. The tribal council had presented a Law and Order Resolution to the superintendent but the Resolution failed to be passed by the superintendent within the required ten-day limit. The superintendent called the Resolutions "illegal because they were not presented within the time span required." The tribe reenacted the Resolution in November of 1951. Hearing nothing from the superintendent, the council wondered what happened. The Council wrote to the Tribal Relations Office in Washington who said that "no such Resolution was received in this office."

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[32] Archives: Bureau of Indian Affairs, 1946 Annual Report, Accession No. 56A–588.

[33] Archives: Bureau of Indian Affairs, 1946–1947, Tribal Minutes and Intra-tribal correspondence, Accession No. 56A–588.

[34] Archives: Bureau of Indian Affairs, 1948 letters to Commissioner. Accession No. 57A–188. File No. 144,147.

The second item on the council agenda was the shortage of coal in the Pine Ridge schools. The delegation said the weather was cold and the children were freezing at their desks. The area director was told of the situation but said he had received "no report concerning the shortage of coal at any Pine Ridge school." He did say that he would check it with the superintendent. Nothing happened.

The third matter concerned the revocation of the power of attorney on Pine Ridge grazing lands. Tribal bills were late because payment procedures must follow BIA's requirements. Instead of direct tribal collection, BIA paperwork was in control. The Commissioner wrote that the power of attorney by tribal government was tied to the study of the trusteeship question. "Resolution of this problem may mean that Congress be relieved of the trusteeship responsibility."

The tribal council then requested that the Bureau respond to their immediate assistance clause for green timber permits to use and sell timber on the reservation. Instead of responding to the tribe's economic development request, the Assistant Commissioner said he would "establish placement programs for secure jobs and find homes for employable Indians away from the reservation in communities where they can become self-supporting."[36]

Frustrated by veiled threats of loss of sovereignty and population, the 1954 Delegation wrote to the Commissioner that "too much emphasis (is) on the supervision of Indians and not enough on helping us." The delegation letter suggested that federal appropriations be shifted from offices which tell Indians what to do to Indians. Tribal government called the Bureau's exercise of extreme discretion in disbursing money and policy decisions an abuse of its power to assist tribal government development. This abuse divided the tribe by creating and supporting a power bloc to the expense of tribal participation.[37]

GOVERNMENT WITHOUT MONEY

Another problem is the business of running a government without a budget. The 1954 delegation explained that their BIA budget allocates $3600 for a Civil Service secretary which is "much higher than that of many of the responsible officials of the Tribal Government." They also pointed out that no budget items were submitted for construction or education and "demanded immediate submission (by the Bureau) to the law for those purposes." Money that was allocated by the Bureau was "being badly spent." Indian moneys are used by BIA officials for their private telephone and other utilities on the reservation." The delegation demanded immediate withdrawal of those facilities since the "phones and utilities are not available to the tribe outside of office hours."[38]

The delegates demanded a reorganization of Bureau authority and budget lines which would "help Indians in two ways. It would relieve us of unnecessary bureaucratic supervision and allow us to act as normal adult human beings."

THE BIA AS IN LOCO PARENTIS

By 1954 the position of the BIA as the highest authority on the reservation was painfully evident. The pattern of routing individual complaints to a higher authority than tribal council was encouraged by both area officers as well the very structure of the Bureau.[39] A Harvard study in 1943—financed by the Bureau—called the tribal government at Pine Ridge little more than "comic opera." Perhaps in some instances this is correct—but the secretarial review authority renders tribal government decisions useless. When issues aren't particularly important to the Bureau, the tribal council is allowed jurisdiction. If the issues relate to land, resources, large amounts of money or incursions on Bureau policy, Bureau decisions are delayed or withheld to maintain its supreme authority.[40]

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[35] Archives: Bureau of Indian Affairs. 1951: Superintendent to Commissioner. Accession No. 57A-188. File No. 147.

[36] Archives: Bureau of Indian Affairs, 1952 Correspondence. Accession No. 57A-188. File No. 147.

[37] Archives: Bureau of Indian Affairs. 1954 Tribal Minutes. Accession No. 59A-643, 67.

[38] Archives: Bureau of Indian Affairs. *Ibid.*

CONCERN FOR PUBLICITY

The Bureau's main concern is good press. A reporter from the 1955 Dave Garroway Television Show wanted to make a documentary of the Pine Ridge Reservation. After the area director showed him around the reservation, the director wrote to the Bureau, "Michaels appreciates the fact that the Bureau is doing the best it can with limited funds made available to it by Congress. I am sure that he will try to tell the Sioux story in such a fashion that responsibility for these conditions (on the reservation) will not be laid at the door of the Bureau."

Much of the current correspondence from tribal government operations lengthily explains Bureau policy to non-Indians, while responses to tribal members are from notes which recognize receipt of their letter with little satisfactory response.

MONEY AND LOANS

Money, the lack of money and the political use of money has been a perpetual problem at Pine Ridge. A former superintendent explained in an interview that money was often used to support one tribal member over another. "Let's face it," he said, "whoever controls the purse controls the tribe." But the area director's report did not describe the politics of money or its use. He was more interested in neat records. In his 1957 report, the superintendent noted, "the revolving credit books were maintained in an orderly and neat manner throughout the fiscal period." The area officer's gravest concern was the problem of delinquent loans. Twenty-five loans for a total of $36,000 were outstanding. The area director requested immediate action for loan recovery. "Tribal government should make a thorough review of all delinquents and make a concerted effort to speed up collections." The area director was making a collection agency of tribal government by asking its credit committee to develop and carry out a strong collection policy.[41]

Loan decisions produced another conflict between the Bureau and the tribal government. The Bureau preferred large "rehabilitation" loans subject to the BIA Manual which would "in the long run benefit the Indian people than small convenience type loans." Tribal government felt otherwise. The 1960 tribal council approved small loans for educational purposes or to meet immediate needs. The Bureau questioned whether sufficient judgment and care was used in approving those loans.[42] "We certainly would be doing the Indians, the tribe and the United States a disservice to place the Indians so heavily in debt unless there is a reasonable chance to succeed in their enterprise."

Unable to stop the small loans, the agency leaned on the people who received them by interfering with their personal lives. "Since all the applicants who received loans appear to have free time on their hands, and living expenses were to be provided by the loans, I felt that if the loan were approved they would be obligated to put their time to good use. This condition would make them mindful."[43]

Tribal government officials called loan decisions its responsibility. In a communication to the area director, the government noted that "the area director approves loans based only on the dollar amount expected in return." Reacting to Bureau-rejected small business loans, the tribal government said, "we know these people who may have started a business from scratch and that through long hours and a determination to succeed, need expansion money. The tribal council and its credit branch has full knowledge of the people involved, local conditions and the character and strength of the applicants. The area office, hundreds of miles away, cannot fully know these factors." [44]

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[39] Archives: Bureau of Indian Affairs. *Ibid.*

[40] Archives: Bureau of Indian Affairs. *Ibid.*

[41] Archives: Bureau of Indian Affairs. 1957 Annual Report. Accession No. 64A–528, 84.

[42] Archives: Bureau of Indian Affairs. 1960 Annual Report and Tribal Minutes. Accession No. 68A–2045.

[43] Archives: Bureau of Indian Affairs. 1960 Area Directors letters Re: Loans. Accession No. 68A–2045, 14.

[44] Archives: Bureau of Indian Affairs. 1960 Economic Development Letters. Ibid.

NO AUTHORITY MEANS NO GOVERNMENT

Tribal government challenged the Bureau's articulated and unarticulated charges of "incompetency" which defined individual members as well as the tribe.

Land and money issues focused the problem. "Two problems face the Indians: unemployment and diminishing land base. Without real authority to reverse this, tribal government is a mockery." The tribal government voted, once again,[45] to place a moratorium on land sales for fifty years. The area director noted that he couldn't make that kind of commitment but would halt immediate sales of large tracts of land. He requested, from the council, a detailed land management program and asked where the funds for tribal purchase of land would come from. The tribal government wrote to the Commissioner for money to purchase land. Instead of responding to the tribal request, the Commissioner blocked the program by inaction but complimented the writer for his "ability to express himself and represent his people admirably."

To relieve unemployment, the tribe requested an economic development program which would "keep Indians busy in their idle time." He suggested "a 48 hour work week with a pay scale between $25 and $30 dollars. Low as this scale might seem," he said, "it would provide minimum subsistence." The area director concurred, saying that "the reservation must shift from a land economy to a wage economy even though wage work is often make work."

Frustrated by his own bureaucracy, the area director told Oglala Sioux that "the needs of the Oglala Sioux people have become by nature and magnitude beyond our ability to meet through normal Bureau programs. Our services to them (Oglala Sioux), while meeting some of their utilitarian needs, has many gaps and we are losing ground in our efforts to meet the real human problems."[46]

The 1960 tribal government attempted to raise operating money by exercising its constitutional authority to levy reasonable taxes on nonmembers doing business within the reservation. The U.S. courts affirmed his power.[47] The tribal government, in 1967, enacted a full taxing ordinance but continually met with recalcitrant traders on patented land. The traders continually refused, according to the records, to pay the taxes. And the problems of application and enforcement of the law continue to this day.

Legal interpretations inhibited strong tribal government. Resolutions passed by tribal councils were so tangled by outdated taxlaw that tribal decisions were often appealed on unforeseen technicalities. After the tribal government resolved to tax patent land, it learned that it was subject to a 1956 law which limited its taxing authority.[48] For tribes to realize their fair share of reservation income, double taxation must be eliminated by ousting State taxing authority. The primacy of tribal taxation powers is essential to tribal self-government.[49]

Outmoded law stopped tribal government from raising revenues. In 1958, the council required working patent land traders to submit credentials for bonding. The traders, with area office support said that they were subject only to the Federal Trader License Law. The area director wrote: "while trader license law is outmoded, it is nevertheless still the law." The director did not consider a test case to question the outmoded law.

The sixties was an era of a Bureau tribal government operations attempt to streamline tribal council constitutional amendments and resolutions. Oftentimes the Bureau's streamlining revised the intent, if not the spirit of tribal council law. In a September 1960 interpretation of a tribal amendment, a Bureau official wrote, "I believe that the last sentence of the paragraph would read better if . . . and I doubt that the executive council intended . . ."

Later that month, the tribal council complained of internal fiscal irregularities. After communicating its trouble to the Bureau, tribal government operations suggested that the tribe hire an accountant. The Bureau then unilaterally laid out steps to resolve the money matters. In a number of letters that year, the Bureau on one hand suggested that tribal issues be brought to the attention of all tribal members, but rejected a plebescite by suggesting that "the Secretary would probably not accept that alternative."[50]

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[45] Archives: Bureau of Indian Affairs. Tribal Government consistently passes resolutions and amendments which were delayed or ignored by the superintendent. In this way, the superintendent minimized tribal authority and maximized his own. Supra. (footnote 31).

[46] Archives: Bureau of Indian Affairs. 1958 letters. Accession No. 66A-641, 9.

[47] *Iron Crow v. Oglala Sioux Tribe* (231 F (2d) 89).

[48] *Squire v. Capoeman* (351, U.S. 1).

[49] "A Proposal for Clarifying Tax Status of Indians"; Daniel H. Israel, Native American Rights Fund, 1976.

[50] Archives: Bureau of Indian Affairs. 1960 letters. Accession No. 68A-2045.

The tribal council voted against the Bureau's fiscal procedures. Bureau letters flooded tribal government asking why it rejected Bureau recommendations since the council "already accepted our administrative procedures." A phalanx of bureaucrats and Congressmen pressured the tribe to accept Bureau procedures by taking no further fiscal action until the tribe accepted Bureau recommendations.[51] The crux of the problem was tribal council's authorization of $1200 in loans without Bureau approval.

The tribal government was adamant about subjecting itself to BIA procedures. But six months later, the tribal government nearly unanimously adopted those same procedures. The BIA, in a mema to the tribal government, complimented them on their "ability for self government." While the records do not fill all the gaps, the *fact* is that the Bureau forces inter-tribal division to gain Bureau acceptance. Often, this determines policy and issue positions of one or the other groups. Generally, those in power will tow the mark and receive the favored position. Most importantly, the Bureau, in its memos, makes no mention of internal difficulties while performing a catalyst function of the perpetuation of those divisions.

TRIBAL DIVISION AND BUREAU INTERVENTION

By December of 1961, widespread tribal dissatisfaction erupted. A petition was circulated to call for new elections. That meant that the Bureau had to be contacted. Representatives traveled to Washington to discuss tribal difficulties. The inter-district council, rooted in the Old Dealers, re-emerged. The superintendent wrote to the area director that the Old Dealers are "actively circulating petitions within their particular districts to obtain sufficient signatures of tribal members to request the Secretary call an election and recall current council members. They are asking the Secretary abolish the present tribal government council.

In 1962, the Inter-District Council requested of the Commissioner "a complete reorganization of tribal government." The council requested an exhaustive investigation of the "Tribal Government and its personnel, especially the Court House." The council also requested that government employees be transferred from their employment every four years to allow better working relations with the tribal council. "Some of these employees have been at this agency too long to suit the people because of their wrongful actions."

The Inter-District Council noted that "mixed blood Indian people have preference in tribal employment especially if any of the council members have relations. Of course, you know that our tribal government is now controlled by mixed blood elements pretty strong. For this reason our full bloods would like to get away from the tribal affairs." Law and order was also a problem of blood. "Law and order has been the weapon of the mixed blood element to run the full blood Indians. "Mr. Commissioner," the Council said, "there are many numerous wrongs being done here on this reservation and the full blood elements are living in fear. A good investigation is needed on this reservation. This is the only solution."

The Commissioner responded to the council. "(Your) memorandum requests a complete reorganization of the tribal government and an investigation be made of tribal personnel, especially the tribal court. These matters are primarily in the nature of internal tribal affairs and no specific complaints have been made in the memorandum." The Commissioner added that "the Bureau does not have a policy whereby employees are automatically transferred after certain periods and it does not think it wise to establish such a policy." He concluded by saying that "the strife between full blood and mixed blood elements on Pine Ridge Reservation has been the subject of voluminous correspondence over the years. This situation is lamentable," he said, "and hardly conducive to the social and economic betterment of the total membership of the tribe."

The Bureau policy of hands on when it suits its interests was evident in the next major communication to the tribal government operations by a Bureau consultant, who suggested a new Bureau move to "streamline" the tribal government. "We very strongly recommend that the council consider an additional (district) restructuring." He then suggested specific districts to be consolidated or eliminated.[51a]

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[51] Archives: Bureau of Indian Affairs. 1962 letters. Accession No. 69A–8351 and Fereca Report (supra).

[51a] Archives: Bureau of Indian Affairs. 1965 Commissioner Memoranda. 72A–5460. No. 4, 8, 7.

The Bureau's position was that the Pine Ridge representatives were twice as many as need be. After the 1964 election, Pine Ridge established a new community at the Pine Ridge Indian village. The Commissioner wrote to the tribal council that he was concerned with the "establishment of a new community because of the increase in the size of the tribal council." He said, "any governing body has an optimum size for efficient operation. The question in our minds is, has this optimum been surpassed at Pine Ridge."

By 1965 the Pine Ridge tribal government elected to revise their constitution and bylaws.

NO AUTONOMY IS THE BEST AUTONOMY

The Bureau, in its memoranda, were open about their concerns of tribal autonomy. The area tribal operations officer wrote to the area director that "we suggest your recommendations (vis-a-vis tribal resolutions and amendments) be based on the *up-to-date needs of the Bureau and (then) consideration be given to the possible need of the tribe.*" (Emphasis added.)[52]

The memos were a response to constitutional amendments and election procedures which were called "weak" by a series of communicaitons between BIA officers. The tribal attorneys had assisted tribal government in its preparation for the elctions. But the attorneys did not consult with the Bureau about those procedures. A tribal government operations spokesman wrote to the tribe: "we thoroughly oppose the tribes' and attorneys' setting dates for constitutional elections in advance of the Secretary's calling the election. The Secretary reacts strongly against such *fait accompli's.*" The tribal operations man then wrote to the associate commissioner, "we plan to needle the attorneys as to their not consulting with us earlier."[53] The Bureau clearly held the reins and pulled them when their interests were not served.

The situation got worse. The tribal government wanted to have the elections held. But the BIA requires a 30-day review period after the Secretary calls the election and then another 30 days for tribal notification. The tribal government operations at the Bureau wrote, "having really pressured the Secretary and the solicitor to get Rosebud out in time, we feel that if we do so again simply to accommodate the attorneys and the tribe, who set the date in advance of Secretarial consideration and without consultation with the Bureau, we will really be *personna non grata.*"[54]

LAW AND ORDER

In July, 1966, the tribal delegates worried about the law and order program. The tribal government delegates met with the area director to say that the tribal council was not satisfied with the administration of the law and order program. The council said it had too little voice in the program, that the police would not be headquartered at Pine Ridge but stationed out in the districts where there was inadequate police protection, and that members of the police force were not performing their jobs adequately. "The police stay on the main roads and don't go into the communities where the crimes occur. The police are not full blooded Indians and are unable to speak the Sioux language. The police use harsher methods in dealing with full blooded Indians than they do with respect to others."[55]

The tribal government discussed refusing to enter into a contract with the Bureau which makes federal funds available to the tribe for law and order.[56]

Part of the problem stemmed from jurisdictional questions. A South Dakota state statute provides that the state of South Dakota will assume jurisdiction over civil and criminal causes of action arising on the highways running through the various Indian reservations in the state. The law became effective on July 1, 1962. The Fall River County states' attorney wrote in a communication to the tribal government that he did not believe the law valid and recommended that "law enforcement officers in Fall River and Shannon Counties, where Pine Ridge is located, not act pursuant to the statute. The State Attorney General said the statute was valid and must be observed. The Aberdeen Area Office advised all South Dakota agencies that the opinion of the State Attorney General must be observed until such time as the statute was challenged in the courts of competent jurisdiction and declared invalid. He did not suggest that the solicitor's office do so. The tribal attorney advised that the tribe take the same position as the Fall River state's attorney. The delegates reported that in their opinion "the uncompromising position of the state and county officials resulted in a serious breakdown of their law enforcement program." [57]

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[52] Archives: Bureau of Indian Affairs. 1965 Ibid. (Tribal Government operations to Area Director).

[53] Archives: Bureau of Indian Affairs. Ibid.

[54] Archives: Bureau of Indian Affairs. Ibid.

[55] Archives: Bureau of Indian Affairs. 1966 meeting minutes. Accession No. 72A-8022. 5.

[56] Archives: Bureau of Indian Affairs. 1966 Law and Order Memoranda. Accession No.

The tribal operations officer responded to the tribal government assertions of a law and order breakdown. "The law enforcement officers are employed under the Civil Service Regulations and are required to have only a working knowledge rather than a fluent usage of the Sioux language. The tribal council believes that more full blooded police should be hired, but none qualify under Civil Service law. The council further feels that the federal requirements and the Sioux needs are incompatible. The council also requested that two policemen could be hired for the salary of one. But Federal Civil Law requires a certain salary to be paid. The BIA tribal government operations said that if the tribal government didn't renew its law and order contract, a "state of anarchy would exist." A Tribal Council member said. "In my opinion anarchy already exists." Again, bureaucracy conflicts with reservation reality.

Sales Taxes and Ordinances

A 1963 tribal government ordinance caused great Bureau consternation. Tribal government notified all Pine Ridge traders and businessmen to cease collecting states taxes. But tribal government operations at the Bureau wrote to the area director that "traders have always collected taxes" and "taxation should be taken up between the individual merchants and the state and not with tribal government." A tribal service station was about to open and the Bureau worried that the tribes would see this as a test case to not collect state taxes "if at all possible." The area director reported that "there is a sort of tribal committee, apparently unofficial and without tribal sanction that looks after village affairs at Pine Ridge. The tribal council has not yet taken position on the committee's action." The field solicitor advised the superintendent to "advise the council to seek counsel from its lawyers." The Commissioner believed that the committee's action could only upset state authorities and provide ammunition for another legislative attempt to assume jurisdiction at Pine Ridge under P.L. 280." [58]

At a council meeting to discuss tax issues, the tribal attorney (a Sioux living on the reservation) explained that the tribe should pass its own taxes instead of allowing scarce dollars to enter the state slush funds. Then "we'd be able to use the money to upgrade some of our own services. The problem is that money just passes through the reservation and doesn't stay here long enough to do us any good."

As anger compounded on the reservation, the Tribal Government Operations at the Bureau figure it should do something. Therefore, they sent an "expert" to Pine Ridge to study taxation. The Bureau shelved the report, "due to its sensitive nature." However, the Bureau did mail several copies to professors of anthropology who requested information on tribal government. It appears that "only the tribe had no access to the study." The report spoke of tribal government. "The basic question is whether the present constitutional form of government, now a quarter of a century old, is compatible with the culture of these (Sioux) people." [59]

The report reinforced Bureau mythology that tribal governments are not capable to govern their tribes. The report called tribal resolutions "a dime a dozen." Instead of reflecting on the bureaucratic morass which tribal government must tend after passing a resolution, the reporter decided that the Oglala Sioux tribal government members "don't give much credence to their own resolutions." [60] The Oglalas, as a rule, feel so optimistic and self-satisfied with the actual passing, writing and signing of the resolution that little attempt is made to implement the content of the paper or even to see its reaching the proper official."

Further, the report reduced issues most important to the tribal government [illegible]ngless discussion." As examples of this "meaningless discussion," the report [illegible] that "many resolutions contain unrealistic demands, such as that passed by [illegible] Medicine Root District requesting thousands of dollars from the former Commissioner for pigs, housing materials and a block machine." Other resolutions, the report noted, "call for the transfer of government employees."

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[57] Archives [illegible]eau of Indian Affairs. Ibid.
[58] Archives [illegible]reau of Indian Affairs. Ibid.
[59] Archives [illegible]reau of Indian Affairs. Feraca report (supra).
[60] Archives [illegible]reau of Indian Affairs. Ibid.

In 1966, the tribal council confirmed Hobart Keith as the chairman of the Oglala Sioux Housing Authority. Keith wrote to the Bureau to ask how much money the tribe spent for attorneys, why laws passed to protect the Sioux people weren't enforced, and why issues weren't settled until the tribal members were divided against each other. "The allotted members are divided against the unallotted tribesmen which is tearing the guts out of the council over twenty acre allotments."

In response, the Bureau wrote that "Your letters are often stimulating and always colorful. You are indeed an artist with both pen and brush." Frustrated by a history of no response from the Bureau, Keith wrote to the Commissioner and begged to be civilized. "I am now ready to be civilized," he wrote, "to relieve me of the burden of trying to govern myself."

MEMBERSHIP

Once again, in 1968, membership emerged as a major problem. A flurry of letters requesting benefits for Oglalas living off the reservation as well as full blooded half blooded battles for power on the tribal council question of membership. Letters to the superintendant, area director and tribal government inquired who was on the tribal role and who was not. The letters to the Bureau were forwarded back to the tribal government stating that "according to the constitution, it is the tribe who makes the decision about who is an Indian entitled to all benefits and who is not." But in some cases, members were dropped from the rolls by the Bureau Acting Agent who never explained why he took such action. A tribal member wrote to the Commission that his "sons live on ranches on the reservation but don't know what to do since they don't know what their rights are and are uncertain about their futures." The Commissioner responded that they "have no rights whatsoever on the reservation and should be removed therefrom within a reasonable length of time."

Because membership depends upon birth on the reservation, in some families, several children are full members and other are not members at all. At a hearing with Senator Mundt, tribal members testified that the "Bureau of Indian Affairs is acting to divide our tribe." A blood quantum controversy emerged and the tribal council ruled that a "person must have one-quarter or more Indian blood to be a member of the tribe and therefore eligible for grazing and land allotments on the reservation."

Subsequently, the tribal court judge issued a decision declaring the council's blood quantum edict in "violation of the Oglala Sioux Tribal Constitution." Protests on the judge's decision were registered with the Commissioner of Indian Affairs, the Secretary of the Interior and the tribal court at Pine Ridge. A Washington legal firm filed an appeal.

In a letter from the acting area director to the superintendent, the director noted that "it appears that many of the participants are not fully aware of the basis and criteria for membership in the Oglala Sioux Tribe and are inclined to make changes in the membership roll."

The tribal constitution recognizes as members of the Oglala Sioux Tribe, "all persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935." If the tribe wishes to make changes, however, it must proceed through constitutional amendment under the provisions of Article XI of the constitution and Parts 52 and 53 of Ttitle 25, Code of Federal Regulations. Such an amendment would not be effective retroactively and would not operate to deprive anyone now on the roll of his or her membership. It could, of course, establish new criteria for future enrollments.

Again, the Bureau's intrusion into internal affairs changes the venue of a democratic process of working out problems at the tribal level. The existence of the higher authority—an authority to whom letters of anger are written—drastically alters the procedures of negotiating internal differences. In 1967 an Oglala member wrote to Robert Kennedy that he would like the Senator to "build a real fire under the Bureau and have them take appropriate action to have the people removed who were allowed to enter the tribe. The descendents of some of those names are the very ones who are giving us trouble here on the reservation."[61] Without the existence of the higher authority, letters such as these might instead be translated into a democratic process of tribal government.

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[61] Archives: Bureau of Indian Affairs. 1967 letter to Robert Kennedy. Accession No. 73A-1106, 5.

ATTORNEYS

Since the adoption of an IRA constitution in 1934, the tribe found it necessary to hire attorneys to both explain the legal maze of Indian law and to position clout in Washington's appropriate places. A contract between the Oglala Sioux and the law firm of Fried, Frank Harris, Shriver and Kampelman of Washington, D.C., was approved in 1972 for legal services performed in connection with the tribe's loan application to the Farmer's Home Administration of the U.S. Department of Agriculture under authority of P.L. 91–229.

The purpose of the loan was for land acquisition. The compensation to the attorneys was $5,570 for the first $400,000, and one quarter of one percent for any amount in excess of $400,000. The loan was expedited by the firm's personal clout with the F.H.A. Through his efforts, the tribe obtained a loan without executing a mortgage of tribal land. Since the tribal council did not have the authority to mortgage tribal land, the waiver was the only way to get a loan. The attorneys then proceeded to assist the tribe in obtaining a land acquisition grant for $2.1 million.

With respect to the land acquisition, the field solicitor wrote to the tribal government that it is "ordinarily the responsibility of the Bureau to perform all necessary administrative functions regarding the acquisition, management and disposition of trust land and any necessary legal services are provided by this office if necessary." The letter continued to say that it would be less expensive and more expeditious to go through the solicitor's office for land purchase. However, until the tribal council decided to move on the land question themselves by hiring outside attorneys, no land was purchased. Clearly, the solicitor's office maintains a holding pattern until it considers its toes crimped.

Until the hiring of the Washington law firm, no direct communication on land issues was communicated from the solicitor's office to the tribal government.

LAND

The problem of the condemnation of land for a gunnery range has threaded Oglala politics since its taking. By 1973, the Department of Parks wanted to subsume some of the land for a national monument and park. Tourism was growing and non-Indians believed that reservations would make perfect tourist meccas. The tribal council preferred that the land be returned to the tribe so that land would be available for the increasing numbers of cattle. Indicating disgust for the Interior-supported parks project, a tribal council member wrote to the Bureau, "is the Park Service planning to find us another source of revenue? First they took away our buffalo and now they're wanting to take our cattle by diminishing our land and then give us back the buffalo in cages (for the tourists)".

The tribe's income has generally been derived from leasing land left in tribal ownership after the allotments were completed, i.e., the money used for operation of tribal government.

The ownership of land is a perpetual problem. In December of 1973, a local BIA realty officer (also one of the largest land holders on the reservation) negotiated a sale of land for a tribal member who thought he was selling his land back to the tribe for the right to build a home. When the tribal member bought a mobile home and placed it on the appointed land, a white man told him to get off his land. It appeared that the realtor sold the land directly after purchasing it from the Oglala Sioux. The transaction occurred in the face of a tribal resolution asking for a moratorium on the sale of all Oglala land to consolidate the reservation. The Bureau apparently ignored the resolution, calling it "not binding" since the "tribe doesn't have the funds to purchase allotted and non-Indian held lands." The tribal council through its attorney, stated that the BIA view was incorrect and was "certainly repugnant to the concept of self-determination." "*We do not believe that all of the Oglala Sioux Tribe's inherent sovereignty over Indian trust land has been extinguished by Congress for lack of funds.*" (Emphasis added.)[illegible]

A report on land use and purchase patterns on the Pine Ridge Reservation charges that traditional land owners are being exploited both by white and part Indian landowners. The report, endorsed by the Bureau superintendent, was compiled from the records of the Bureau, testimony by tribal members and interviews with the editor of the Oglala Nation News.

The report states that Indians of half or more Indian blood are not benefitting from the land they own and are unable to buy land because of "present BIA

[illegible] Akwesasne Notes Nos. 2, 3. Special Issues (April, June) 1973 policies." It concludes that many of these Indian landowners are forced to sell their land because they do not receive enough rental money to keep it. The Indian lessees who can afford land are generally less than half Indian blood and often employed by the Bureau. The report called for higher rental fees to stop the increasing sale of reservation land by those who would take it out of trust status or tribal jurisdiction. "Most Indians buying most of the land are most apt to remove it from tribal jurisdiction," the report stated.

The central complaint of tribal government is that leasing is controlled by the Bureau and land is held by non-Indians. Tribal government is concerned that land and leasing policies are diminishing the tribal land base. The figures indicate that Indians own or use over 68 percent of the land. It is not an accurate reflection of the situation. Indians of three-fourths to full blood control only 2.7 percent of the land on Pine Ridge. Indians with half to three-fourths Indian blood control 5.7 percent. While those between one-fourth and one-half Indian blood control 39.9 percent and non-Indians own or control 30 percent. It is not an accident that the church is the reservations' largest land holder—with 18 square miles of land.[63]

The Bureau's land policy is tribal government's most sensitive political issue. According to the Pine Ridge Commissioner, an Oglala woman wanted to purchase 160 acres of allotted land. The superintendent denied purchase on the basis that she was only one-eighth Oglala Sioux and had previously purchased 6,424 acres of restricted Indian land but alienated 3,000 of those acres from its trust status. The superintendent respected the tribal government decision to consolidate its land base and denied the purchase. The area director, however, did not honor tribal government policy and demanded that the superintendent reverse his decision. The area director noted that "he sees no threat to the tribal effort to maintain its land base by the sale." The superintendent removed his disapproval and the land was sold. Tribal government did not interfere with the Bureau's decision.

By 1973 a group of Old Dealers, American Indian Movement members and other tribal traditionalists—disgusted with the corruption and ineptitude of their Bureau supported government-occupied Wounded Knee. The traditionalists were particularly angry with their diminished representation and authority caused by the Bureau's streamlining of tribal government processes. BIA money and power was concentrated in the village of Pine Ridge as a result of the streamlining to the expense of tribal members who lived in what became known as the outlying districts. The process of stripping away the rural and traditionalists authority as well, dated back to the passage of the IRA constitution. The constitution, never fully accepted by a clear majority of tribal members, laid a shaky foundation on which future Bureau policy was built. A policy which cajoled tribal government into its image through funding policies which acknowledged some tribal members over others.

The following account is from tribal government operations records at the Bureau of Indian Affairs:

The traditional Sioux and their AIM supporters saw their action in Wounded Knee as part of a struggle to regain their sovereign rights under the 1868 Oglala Sioux Treaty and to rid the reservation of the corruption and tyranny of the BIA supported tribal government. Corruption charges were numerous with widespread reservation support. Some Oglala members alleged that the tribal chairman was elected with the help of $10,000 contributed by local white businessmen to whom the contender promised an illegal bootleg operation on the reservation if he were elected. The contender embarked on a harassment campaign aimed at anyone who opposed him. He allegedly hired "goon squads" to threaten and intimidate his opponents by beating them and burning their houses. By November of 1972, he fired the tribal vice president for supporting AIM, and banned several AIM members from the reservation. As president, he refused to call many of the tribal council meetings required by the constitution and dominated those meetings which he did call. The Bureau said it could not become involved with intra-tribal politics—but that was construed as support for the existing government.

By February 1973, some Oglala's were so angry with the tribal chairman's policies that they called for his impeachment based on mismanagement of tribal funds. At that point, the chairman asked for United States marshall support on the reservation and used that support to dominate his own hearings. The politics of sham sparked a takeover at Wounded Knee where traditionalists demanded self-determination rather than BIA termination. From the takeover emerged a trial which encapsulated a history of divisiveness and frustration thrust on the Oglala Sioux by the Bureau of Indian Affairs. The defendant's brief argued that the treaty of 1868 establishes a framework for relationships between the Oglala people, their traditional government, the United States government, the tribal council and the Bureau of Indian Affairs. The defense pointed out that the spirit, if not the letter, of the law had been abused by the Bureau bureaucracy in its relationship with the tribe. Even the IRA Constitutions, which the Oglalas have attempted to repeal since 1946, states that:

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[63] Ibid.

> Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act." (25 U.S.C. 461 et seq.).

Clearly, the historical relationship of the Bureau to the tribes was to twist and mold the tribal government and members into Bureau formulas. That is treaty abrogation."[64]

Worse than any of the traditionalists pretensions, is the Bureau's delusions that the crisis in Indian affairs is the result of "troublemakers" who have created unneeded confrontations. Dividing Indians into hostile (Old Dealer) and friendlies (New Dealer) is nothing new. The body of this report describes the personal attacks against those who do not tow the mark. Normalcy, for the Bureau of Indian Affairs, appears to be an institutionalized criminality that passes for administration of trust responsibilities and which can only create and demand active resistance to policies of which ignore, deprive, divide and destroy accountable and representative government.

TRIBAL GOVERNMENT VIOLATIONS AND BIA RESPONSE

On July 2, 1974, the secretary of the Oglala Sioux Tribal Council wrote to the Commissioner that "serious violations of the federal manual regarding application for federal assistance" were perpetuated by the tribal council chairman and the superintendent. To establish a legal quorum to conduct business, three members of the council must be present and recorded by name in the minutes of the meeting. On the resolution in question, only two tribal names plus the Superintendent appeared on the contract request in question. Someone signed for the tribal secretary who was not present at the meeting. The tribal secretary wrote that:

The superintendent is fully aware that this is not a legal document of the Oglala Sioux Tribe. He has diverted federal funds of $69,000 to a purpose which is of no benefit to the tribe and which is a misdirection of funds.

By August the acting area director responded to the communications. "While we certainly can agree with the vieww that procedures and records maintenance could be upgraded, this office does not require supportive evidence beyond the certification, that legal requirements for a meeting are present. We have no alternative but to accept the resolution as a legitimate action of the Oglala Sioux Tribal Executive Committee." This is the same Executive Committee of the 1973 occupation, and the same government which the U.S. Commission on Civil Rights accused of holding illegal and irregular elections."[65]

Other responses from the Bureau indicate the hands-off policy when the going gets rough, after its historical intervention which produced the problem in the first place. The tribal government operations at the Bureau responded to another tribal government query by noting that "it is my conclusion that a response could not be adequately prepared without access to the pertinent restricted documents to which the letter refers. The voluminous emotional rhetoric is obvious; however, there are very serious allegations made which probably require some response." But, during that same period, an educational loan was denied to a twenty-year-old girl by the area office because "we had a lot of trouble with someone who has your last name."

During the same period (June, 1974), Congressman James Abdnor wrote to the Bureau that there is considerable political unrest on the reservation, widespread unemployment and social and economic conditions are very depressed."

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[64] Bureau Documents and Correspondence Labeled "Wounded Knee."
[65] Ibid.

Further he noted that "decentralization of government is important since the consolidation at Pine Ridge since services are not available to people who live in the outlying districts."

In 1975 the traditional chiefs wrote to the President, "For many winters and many generations we have suffered under this alien system (1934 IRA). Your armies such as the FBI and BIA encroach upon us and occupied what little land we have left—armed with sophisttticated weaponry they are killing us off one by one." In June, the traditional chiefs communicated their decision with respect to their frustrations with the U.S. Government and its trust responsibility. "For failure of the government of the United States to live up to its treaty obligations, (we) terminate from the present tribal government and form the Lakota Treaty Council." This Council has its history in the Black Hills Claim and Treaty Council which pursued and won (from the Indian Claims Commission) a ruling that the takings of Sioux lands following the Treaty of 1868 were improper and the Sioux Tribes were awarded $17,000,000.

Despite the recognition accorded the traditionalists by the claims commission, the Bureau refused to meet with the council about tribal problems. In a letter from the Acting Deputy Commissioner to the Acting Secretary of the Interior (1975) the requested meeting was denied. "Nothing could come of a meeting and no matter how 'informal', it would be classified as recognition—a contradiction of our policy."

But in a special report from the Deputy Assistant Secretary to the Secretary of the Interior, the divisions within the reservation were recognized but the Bureau's role in the cause of those divisions was ignored. "Pine Ridge is both unique and typical. Sadly enough, many of the underlying problems are all too typical of too many Indian reservations. Tribal government lacks the necessary resources to provide responsive and responsible leadership."[illegible] But the resources do exist on the reservation. The problem is their distribution. Over 40 percent of those people employed on Pine Ridge are significantly under-employed according to the report. In sharp contrast the non-Indian residents enjoy reasonable standards of living. Many derive significant portions of their incomes from Indian resources or from activities associated with federal programs intended to serve Indians."

The report blasted the implementation of Bureau programs as a contributor to the continuattion of substandard living conditions. "The interdependency of programs and services and their apparent lack of responsiveness is graphically illustrated by the example of the individual desiring housing on his own land. The necessary coordination of housing construction, water supply, development and real property management arrangements are often presented (by the Bureau) as unsurmountable objects to the client when they could be overcome with some imagination, cooperation and dedication."

The report concluded that "in general, Bureau employees at Pine Ridge appear to be insecure, unsure of the mission of the Bureau and uncertain of their role in it."

CONCLUSION

Tribal government is only as strong as the acceptance of its tribal membership. For the most part, tribal governments have learned to function effectively and meet the changing needs of tribes despite the Bureau's intricate legal and bureaucratic web. The history of bureaucratic intervention is a long one which has interjected its needs to mold tribal government in its own image. Viewed from the tribe, the Bureau can best be described as a maze of confusion, contradiction, inconsistency and fragmentation. Bureau actions are often interpreted as deliberate maneuvers to mitigate tribal government action. Whether deliberate or in good faith, Bureau intervention and the IRA's secretarial approval clause demands that tribal governments operate by sheer tenacity. Economic development, jurisdiction, civil law and land consolidation must be autonomous functions of tribal government for that government to seriously represent its members. Small bureaucratic reforms to improve the Bureau's delivery systems will not affect the basic paternal relationship which continually thwarts tribal government. The history of the Bureau of Indian Affairs as the bureaucracy of last resort can do little more than continue to undermine tribal government sovereignty, on one hand, while assuming a position of non-intervention on issues which emerge as a result of the Bureau's existence.

[illegible] Special Report to Commissioner (supra).

APPENDIX XVII.—ANALYSIS OF TRIBAL POPULATION

Size of tribe	Number of tribes	California	Alaskan villages
0 to 200	222	46	128
201 to 500	97	7	43
501 to 1,000	30	2	4
1,001 to 2,000	34	1	4
2,001 to 3,000	17		
3,001 to 4,000	5		
4,001 to 5,000	3		
5,001 to 7,000	8		
7,001 to 10,000	2		
Oglala	[1] 12,515		
Cherokee	[1] 26,042		
Navajo	[1] 125,570		
Total	421	56	179

NOTES

1. 52.7 percent of tribes have 200 or less people.
2. 75.8 percent of tribes have 500 or less people.
3. 82.9 percent of tribes have 1,000 or less people.
4. 17.1 percent of tribes have 1,000 or more people.
5. 3.1 percent of tribes have 5,000 or more people.

Source: BIA tribes in order by population: 1973 revenue sharing; or equivalent for nonrevenue sharing; or State alternate for Oklahoma.

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Appendix XVIII.—Tribal Government Task Force Field Consultant Reports

Field Consultant Reports

Quinault Indian Reservation

Makah Indian Reservation

Warm Springs Reservation

Soboba Indian Reservation

Santa Rosa "Tachi" Rancheria

Pyramid Lake Paiute Indian Reservation

Pala Indian Reservation

Uintah-Ouray Reservation

Zuni Pueblo

Sisseton-Wahpeton-Sioux, Sisseton Reservation

Cheyenne River Sioux, Cheyenne River Reservation

Fort Berthold Reservation

Rocky Boy's Reservation

Laguna Pueblo

Seneca Nation, Allegany Reservation

Northern Cheyenne Reservation

Cheyenne and Arapaho Tribes of Oklahoma

Comanche Tribe of Oklahoma

Creek Tribe of Oklahoma

Navajo Reservation

Field consultant reports available in AIPRC files.

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APPENDIX XIX.—TRIBAL GOVERNMENT TASK FORCE SURVEYS OF TRIBAL GOVERNMENTS

TRIBAL GOVERNMENT SURVEYS

1.	Aqua Caliente Band of Mission Indians	California.
2.	Ak Chin Indian Community	Arizona.
3.	Benton Paiute Reservation	California.
4.	Bridgeport Indian Reservation	Do.
5.	Cheyenne-Arapaho	Oklahoma.
6.	Eastern Band of Cherokee Indians	North Carolina.
7.	Eskimo Community	Alaska.
8.	Evansville, Inc. (Doyon Regional Corp.)	Do.
9.	Fort Berthold Reservation	North Dakota.
10.	Fort Bidwell Reservation	California.
11.	Fort Hall Reservation	Idaho.
12.	Golden Hill Tribe[1]	Connecticut.
13.	Happy Camp Karok Inc.[1]	California.
14.	Katyaak Corp	Alaska.
15.	Laguna Pueblo	New Mexico.
16.	Lone Pine Band of Owens Valley Paiute and Shoshone	California.
17.	Lower Sioux Indian Community	Minnesota.
18.	Makah	Washington.
19.	Navajo	Arizona/New Mexico.
20.	Northern Arapaho and Eastern Shoshone of Wind River	Wyoming.
21.	Northern Cheyenne	Montana.
22.	Oneida Tribe	Wisconsin.
23.	Orleans Karok[1]	California.
24.	Pala Band of Mission Indians	Do.
25.	Passamaquoddy Tribe[1]	Maine.
26.	Prairie Island Indian Community	Minnesota.
27.	Puyallup Tribe	Washington.
28.	Pyramid Lake Paiute Tribe	Nevada.
29	Quinault Indian Nation	Washington.
30.	Rocky Boy's Reservation	Montana.
31.	Salish & Kootenai	Do.
32.	Santa Rosa Rancheria	California.
33.	Sante Sioux Tribe	South Dakota.
34.	Sault Ste Marie Tribe of Chippewa Indians	Michigan.
35.	Schaghticoke Indians of Kent, Connecticut, Inc.[1]	Connecticut.
36.	Seneca Nation	New York.
37.	Soboba Reservation	California.
38.	Tozitna Ltd	Alaska.
39.	Tunica-Biloxi Tribe of Louisiana, Inc.[1]	Louisiana.
40.	Tununrmiut Rinit Corp	Alaska.
41.	United (Etowah) Cherokee Nation of Georgia[1]	Georgia.
42.	Wampanoag Tribe of Gay Head[1]	Massachusetts.
43.	Warm Springs Reservation	Oregon.
44.	Wyandotte Tribe[1]	Oklahoma.

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[1] Non-Federally recognized tribes.

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APPENDIX XX.—SPEECH DELIVERED BY MR. WILBUR ATCITTY—TRIBAL GOVERNMENT TASK FORCE CHAIRMAN—BEFORE THE 30TH ANNUAL CONVENTION OF THE NATIONAL CONFERENCE OF AMERICAN INDIANS, NOV. 14, 1975

Mr. ATCITTY. Thank you, Neal. I'd like to express my appreciation to NCAI for the opportunity to be here and join with my colleagues in discussing with you the very important work of the Task Force on Tribal Government. I firmly believe that if the task force does the kind of job we want it to do, many of the problems that we are discussing will be resolved.

One reason that I'm happy to be here is that this is one Indian meeting that has some focus and purpose. I used to go to a lot of Indian meetings in the past, but I have been to very few lately. Most of them I've been to have been boring and ineffectual. If anyone is a repetitive and long-winded as a White politician, it is a frustrated Indian.

You know we like to make endless speeches to ourselves about the injustices that have been done to us. You also know we whine and bicker, and while we're whining and bickering, the White Government goes on doing as it pleases. They know we talk a lot; they also know we rarely unite and agree on anything, and that our political muscle is as soft as a sheep's belly.

Today there is virtually no coordination between Indian tribes on legislation, Federal budgets or any other programs, or effort, affecting the lives of the Indian. When the Federal Government asks for the position of the Indian community on any given issue, they can rely on us to present as many views as there are tribes. Then they feel justified in making decisions for us.

We now have one more opportunity to stand up and speak strongly for ourselves with one voice. That opportunity exists in the work of the American Indian Policy Review Commission, which you are discussing at this meeting, and which is the parent body of the Task Force on Tribal Government.

I realize there has been much criticism from some tribes and Indian organizations about the composition of the Commission. I personally believe that some serious errors of political judgment were made when the Commission was put together. I said so at the time. But that is history and the clock cannot be turned back.

The decision before us now is whether or not we, as Indian tribes, organizations and individuals, choose to make this Commission work for us, and there are several good things it can do. It provides us an opportunity to question the status quo; it provides us a national forum to raise the questions which have bothered us for so long and to explore the problems which make Indian survival and self-determination difficult; and it provides us with an official body through which we can claim and assert our rights, and to make our rightful demands on the United States Government. Such opportunities very rarely come our way. We will either seize the opportunity to participate in determining our future in a meaningful way, or wait 50 years for another commission to come along. By that time, it will have been too late.

What I'm trying to say is that we can't have everything both ways. We cannot continue to claim authority without being ready to use authority responsibly. For example, many Indian tribes and organizations with considerable justification, have criticized the 1968 Indian Civil Rights Act; but if we don't like the Act and don't want to subject tribes and tribal members to Anglo concepts of due process, and if we believe that the Act reaches some tribal customs, then we must provide some alternative in our tribal constitutions and codes. We must provide an alternative of our own choice.

That's what we are trying to do with the Task Force on Tribal Government—provide a modern, dynamic, workable alternative to the White Man's concept of how we should govern. We have a lot of sorry history to overcome. When the Indian Reorganiatizon Act was passed over 40 years ago, the tribes were urged to draft constitutions and obtain a charter to allow them to purchase, manage property and in other ways function as a government. The trouble with this was that Indians had no responsible voice in drafting or implementing the Act.

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The Secretary of Interior was given the power to approve the constitution and by-laws as drafted by the tribes. This power was skillfully exploited in a manner that insured the continuing regulatory duties of the BIA, and that also made certain that Indian preferences were balanced with the White Man's ideas of appropriate forms of tribal government. The result was not modern tribal governments capable of coping with modern problems. The Task Force on Tribal Government is trying to determine ways in which tribal government as an institution, can be improved and strengthened to better enable it to meet the needs of its people, and to function effectively in a fast-moving world controlled by the White Man. If the task force is successful, I know we will have rendered a great service to Indian tribes and Indian people.

It is the viability of tribal government as an effective institution which most protects our tribal and cultural integrity and it is our cultural—tribal and cultural integrity which holds us together as tribes. But the viability of tribal government is also essential in order to protect our resources and to provide for the economic security of our people.

For years Indian tribes were shuffled from one parcel of land to another. Always, the result was the same—Indian tribes were given land which White Man considered of no value to himself; and each time wealth was found on this newly-allotted Indian land, the White Man could find some way to cheat the Indian out of his land and his wealth, with or without the help of the Government.

We find ourselves in a similar situation today. The last large deposits of minerals and fossil fuels remaining in this country are on Indian land, and once again, our lands and our resources are becoming the focus of attention of the White Man and the Government. In many ways, this is our last chance to protect our tribal sovereignty. Those tribes which do have mineral resources, have something with which to bargain both with big business and the Government. We must make the best of those bargains now. If we permit ourselves to become totally dependent on the hand-outs of the Government after our mineral resources are gone, then we will have lost our ability to direct our own destinies and with it, our self-respect.

Let us not forget those tribes that do not have mineral resources or a land base. If we forget these smaller tribes, they will surely suffer, and their culture, their dignity, their self-respect and their heritage, will be tarnished and lost forever. Let us give them the benefit of our strength and let them have a voice in establishing a strong, united Indian force. We must develop, and develop quickly, the kind of strong tribal government that can deal effectively with this great opportunity. We cannot depend on the Interior Department or its stepchild, the Bureau of Indian Affairs. The Interior Department has the mandate to develop the last remaining fuel deposits in this country. It also has the mandate to be the trustee of Indian lands and the welfare of Indian people. No more blatant example of conflict of interest exists in this country today. I believe that we must have a healthy self-interested distrust of the Government, and that we must be able to analyze carefully any proposals it makes on our behalf. The truth is, that as Indians we must rely on ourselves. We must develop our ability to judge for ourselves, negotiate for ourselves, determine for ourselves what is in our best interests, and then make decisions for ourselves.

It is our hope that the work of the Commission and of the Task Force on Tribal Government in particular, will help make these goals a reality. For too long, the Indian community has been in the position of reacting rather than acting. These new bodies give us the opportunity to take the initiative. I hope the Indian community takes the initiative in many areas, and certainly one of the most productive is in the political arena.

In recent years, the Navajos have learned to play the White Man's political game, and this has done more to preserve our tribal sovereignty and earn for us the respect of outsiders, than anything I can think of.

We have conducted massive voter registration and get-out-to-vote campaigns. As a result, we have elected Navajos to the State Legislature. We made the critical difference in electing the current Governor of Arizona, and a substantial difference in electing the Governor of New Mexico. Suddenly, the politicians are coming to us. Our views are sought; our advice is asked. I'm sure that never again will candidates for either State or National office take the Navajo people for granted.

Smaller tribes also have political potential within their own states. Elections are often won these days by a handful of votes. Within a given state, several smaller tribes could coordinate their political activities, register their people, and put candidates on notice that they had better be concerned about the needs and concerns of Indian people.

We do not have to be concerned about compromising tribal sovereignty in this regard. Such questions have already been settled by the courts. We have political power but what we must learn to do is use it. One place we must use it is in the Congress of the United States. As you know, Congress recently enacted the Indian Self-Determination Act. Among other things, the Act is supposed to provide for strengthening tribal government, but the President's Office of Management and Budget has refused to request Congress to appropriate funds to carry out the provisions of the Act.

All of us here should lobby strongly with the House and Senate Appropriations Sub-Committee to fund the Indian Self-Determination Act this fiscal year. We should let the White House know in the strongest possible terms that we feel betrayed by the Administration. I hope that before this meeting ends, a resolution to this effect will have been passed and that NCAI will have outlined a vigorous lobbying campaign with the Congress and the White House and which all of us here should have a role as individual tribes. We must assert our rights or we will lose them.

In conclusion, I would hope that the work of the Task Force and the Commission will be viewed by all of us here as a beginning and not as the answer. The investigative work of the Commission will be completed in the next months, and no doubt there will be literally hundreds of recommendations emanating from the Commission report to be implemented by the Congress. We cannot allow these recommendations to be implemented at the will and whim of the Government. We, Indian tribes and Indian organizations, must assume the primary responsibility for assuring full implementation of the Commission's recommedations. Unless we assume responsibility for following up on the implementation of those recommendations, most will not be implemented; and those that are may be implemented more from an Anglo perspective than from an Indian perspective.

As Chairman of the Task Force on Tribal Government, I call upon NCAI to establish a permanent committee to begin work on a plan for long-range follow-up of the work of the American Indian Policy Review Commission. The plan should provide for assuring implementation of all recommendations; the plan should provide for necessary political support; the plan should provide for adequate funding for necessary staff; the plan should also provide for full tribal participation at all levels in guiding the work of the committee.

On behalf of myself and my colleagues on the task force, I thank you for bearing with me through these opening remarks.